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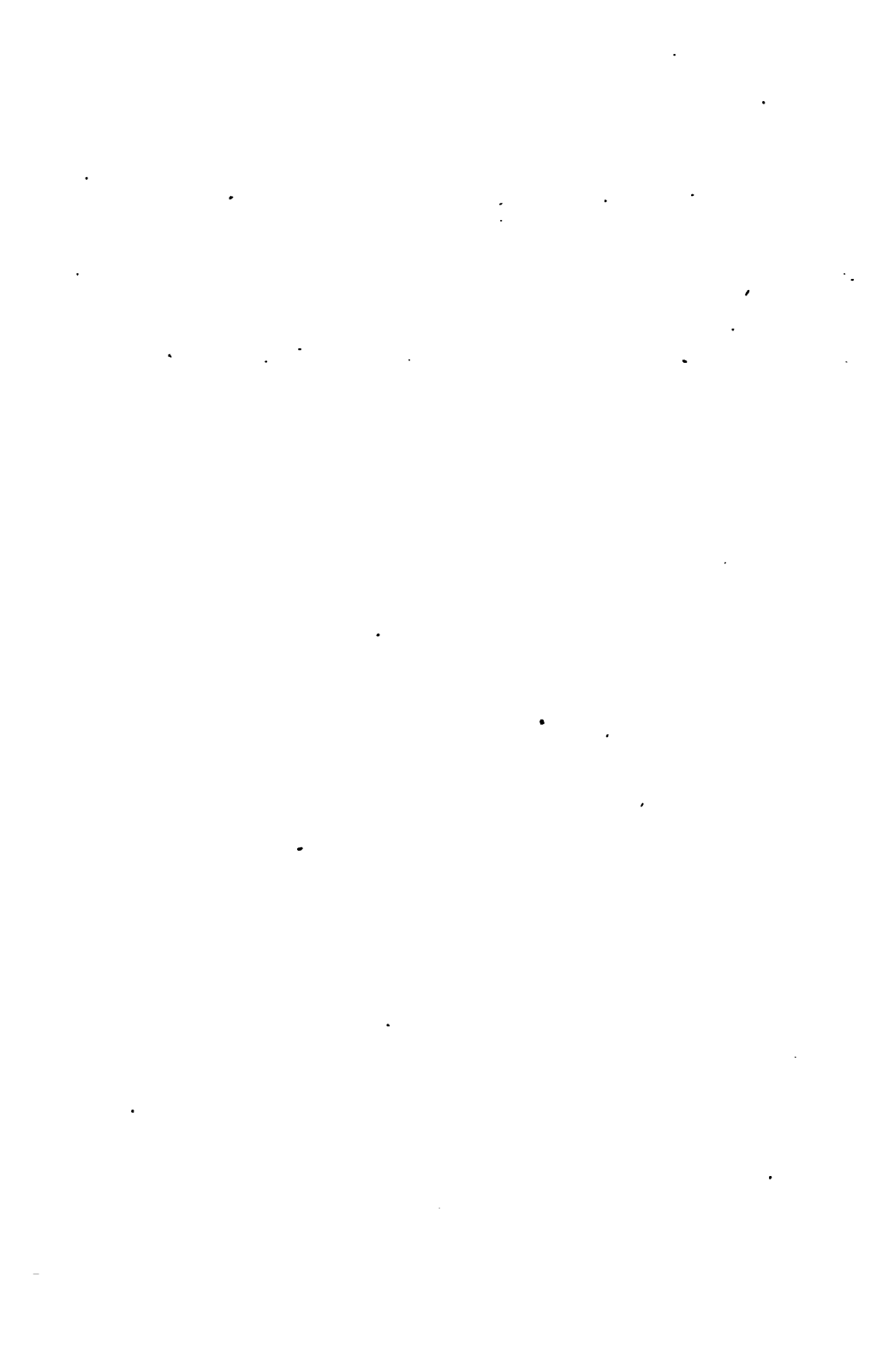
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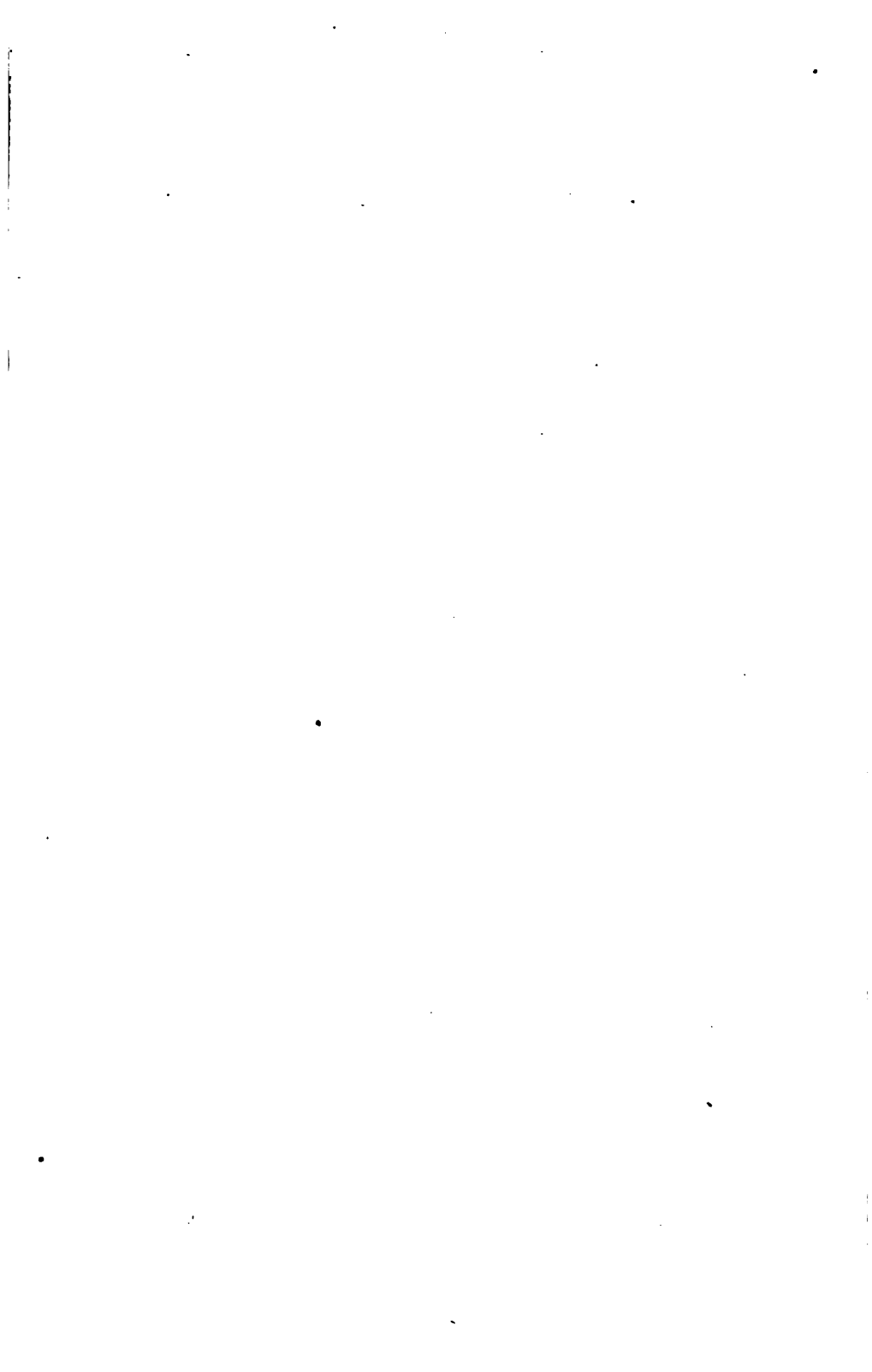
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REPORTS OF CASES

IN THE

SUPREME COURT OF NEBRASKA

**JANUARY AND SEPTEMBER TERMS, 1916, AND
JANUARY TERM, 1917.**

VOLUME C.

HARRY C. LINDSAY,

OFFICIAL REPORTER.

PREPARED AND EDITED BY

HENRY P. STODDART,

DEPUTY REPORTER.

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AUG 28 1917

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During the period covered by these reports, in addition to the cases reported in this volume, there were 12 cases affirmed by the court without opinion, and 125 cases disposed of by the supreme court commission.

TABLE OF CASES REPORTED

	PAGE
Abbott, Horn v.....	403
Adams v. McGrew	817
Ætna Life Ins. Co., Elliott v.	833
Allaire, Woodward & Co. v. Perfection Remedy Co.	726
American Ins. Co., Wlig v.	271
Anderson, Peterson v.	149
Baldwin, First Nat. Bank v.	25
Bankers Surety Co. v. Cross	98
Barr, Dohner v.	172
Bee Publishing Co., Howell v.	39
Belk v. Capital Fire Ins. Co.	260
Bentley v. Space	486
Berry, Modern Woodmen of America v.	820
Bierbach v. Mutual Benefit Health & Accident Ass'n.	675
Birge, Clark v.	769
Black Bros. v. Logan County	478
Boon v. Estate of Brockway	281
Bosler v. Modern Woodmen of America	570
Brady v. State Ins. Co.	497
Broadhurst, Vetter v.	356
Brockway, In re Estate of	281
Brown v. Kirschbraun & Sons	876
Bullion, Ryan v.	705
Campbell v. Union P. R. Co.	375
Capital Fire Ins. Co., Belk v.	260
Carrier v. Getchell	579
Carter White Lead Co., Wiseman v.	584
Casper v. State	367
Chicago, B. & Q. R. Co., Latham v.	173
Chicago & N. W. R. Co., Cohn v.	7
Chicago & N. W. R. Co., Davison v.	462
Chicago & N. W. R. Co., Dexter v.	462
Chicago & N. W. R. Co., McCormick v.	462
Chicago & N. W. R. Co., Underwood v.	275, 507
Chicago, R. I. & P. R. Co., Croghan v.	253
Chicago, R. I. & P. R. Co., Maucher v.	237
Chicago, R. I. & P. R. Co., Richards v.	505
Chicago, R. I. & P. R. Co., State v.	268
Chittenden v. Kibler	756
City of Columbus, Wurdeman v.	134
City of Lincoln v. Lincoln Gas & Electric Light Co.	182

	PAGE
City of Lincoln v. Lincoln Gas & Electric Light Co.	188
City of Omaha, Kaplan v.	567
City of Omaha, Robbins v.	439
City of South Omaha, Wiese v.	492
Clark v. Birge	769
Clary, State v.	324
Clay Center State Bank, Exchange Bank v.	278
Cohn v. Chicago & N. W. R. Co.	7
Cole v. Myers	480
Columbus, City of, Wurdeman v.	134
Cone, Powell v.	562
Cook v. National Fidelity & Casualty Co.	641
Coons v. State	414
Cooper, Crancer Co. v.	335
Cormick v. First Trust Co.	669
Cormick, In re Estate of	669
Cox, Wallace v.	601
Crancer Co. v. Cooper	335
Crane, Wunder v.	446
Creighton, Hoopes v.	510
Crinkley v. Rogers	647
Croghan v. Chicago, R. I. & P. R. Co.	253
Crosby, Erickson v.	372
Cross, Bankers Surety Co. v.	98
Crowell v. Skillicorn	429
Cudahy Packing Co., Green v.	680
Cudahy Packing Co., Koran v.	693
Cudahy Packing Co., Rookstool v.	118, 851
Daggett v. Drainage District	379
Dahlman, State v.	416
Davison v. Chicago & N. W. R. Co.	462
Delano, Johnston v.	192
Dexter v. Chicago & N. W. R. Co.	462
Dohner v. Barr	172
Douglas County, Reudelhuber v.	687
Drainage District, Daggett v.	379
Drainage District, State v.	625
Dunn, Selicow v.	615
Ellifritz, State v.	320
Elliott v. Aetna Life Ins. Co.	833
Enterprise Planing Mill Co. v. Methodist Episcopal Church	29
Enyart v. Enyart	337
Enyart, In re Estate of	337
Erickson v. Crosby	372
Estate of Brockway, Boon v.	281

	PAGE
Evans v. Gilmore	657
Exchange Bank v. Clay Center State Bank	278
Farmers Co-operative Creamery & Supply Co. v. McDonald.....	33
Fassler v. Streitt	722
Felthauser v. Greeble	652
First Nat. Bank v. Baldwin	25
First Trust Co., Cormick v.	669
Foltz v. Maxwell	713
Fritz v. Kirschbraun & Sons	876
Frye, State v.	364
Gage County, State v.	753
Galt v. Hildreth	15, 422
Germania Fire Ins. Co., Stephenson v.	456
Getchell, Carrier v.	579
Getchell, In re Estate of	579
Gilmore, Evans v.	657
Girard Fire & Marine Ins. Co., Wiig v.	271
Goemann v. State	772
Goodman, Smith v.	284
Grayson v. Maryland Casualty Co.	354
Greeble, Felthauser v.	652
Green v. Cudahy Packing Co.	680
Hall v. State	84
Hanley v. Union Stock Yards Co.	232
Harris State v.	745
Hauth v. Sambo	160
Henderson v. Union P. R. Co.	734
Hlatt v. Tomlinson	51
Hildreth, Galt v.	15, 422
Hoffman Slimmer v.	330
Holland v. State	444
Home Savings Bank v. Shallenberger	113
Hoopes v. Creighton	510
Horn v. Abbott	403
Howell v. Bee Publishing Co.	39
Huffman, State Bank v.	396
Hutton v. Missouri P. R. Co.	382
In re Application of Selicow	615
In re Estate of Brockway	281
In re Estate of Cormick	669
In re Estate of Enyart	337
In re Estate of Getchell	579
In re Estate of Johnson	791
In re Supreme Court Commissioners	426
Ish, Spratlan v.	844

	PAGE
Johnson, In re Estate of.....	791
Johnson v. Johnson	791
Johnson v. Lane	177
Johnson v. Petersen	255
Johnston v. Delano	192
Kaplan v. City of Omaha	567
Kelly, State v.	619
Keneston, Taylor v.	730
Kibler, Chittenden v.	756
Kilpatrick Bros. Co., Maranville Ditch Co. v.	371
Kimball, Van Dorn v.	590
Kingrey, Thornton v.	525
Kirschbraun & Sons, Brown v.	876
Kirschbraun & Sons, Fritz v.	876
Kirschbraun & Sons, Marshall & Co. v.	876
Koran v. Cudahy Packing Co.	693
Kountze Real Estate Co., Rankin v.	69
Kriebs v. Kriebs	180
Kriss v. Union P. R. Co.	801
Lane, Johnson v.	177
Latham v. Chicago, B. & Q. R. Co.	173
Lavery, Radcliffe v.	31
Lawler, Pierson v.	783
Lincoln, City of, v. Lincoln Gas & Electric Light Co.	182
Lincoln, City of, v. Lincoln Gas & Electric Light Co.	188
Lincoln Gas & Electric Light Co., City of Lincoln v.	182
Lincoln Gas & Electric Light Co., City of Lincoln v.	188
Lindsey, Plamondon v.	318
Logan County, Black Bros. v.	478
Lohr, Smith v.	4
McCormick v. Chicago & N. W. R. Co.	462
McDonald, Farmers Co-operative Creamery & Supply Co. v.	33
McDonald, State v.	332
McGrew, Adams v.	817
Maranville Ditch Co. v. Kilpatrick Bros. Co.	371
Marquis v. Polk County Telephone Co.	140
Marshall & Co. v. Kirschbraun & Sons	876
Maryland Casualty Co., Grayson v.	354
Maucher v. Chicago, R. I. & P. R. Co.	237
Maxwell, Foltz v.	713
Methodist Episcopal Church, Enterprise Planing Mill Co. v.	29
Meyer, Mundy v.	296
Milbourn, Roper v.	739
Miles v. Richardson County ;,.....	294
Miller v. Swift & Co.	44

	PAGE
Missouri P. R. Co., Hutton v.	382
Missouri P. R. Co., Northcutt v.	1
Missouri P. R. Co., State v.	700
Modern Woodmen of America v. Berry	820
Modern Woodmen of America, Bosler v.	570
Moorhead, State v.	298
Morehead, Patterson v.	760
Morehead, State v.	864
Mundy v. Meyer	296
Mutual Benefit Health & Accident Ass'n, Bierbach v.	675
Myers, Cole v.	480
National Fidelity & Casualty Co., Cook v.	641
Nelson v. Spratt	690
Nemaha County, Nemaha Valley Drainage District v.	64
Nemaha Valley Drainage District v. Nemaha County	64
Northcutt v. Missouri P. R. Co.	1
Nutter v. Standard Land Co.	548
Omaha, City of, Kaplan v.	567
Omaha, City of, Robbins v.	439
Omaha & C. B. Street R. Co., Shapiro v.	452
Omaha & C. B. Street R. Co., State v.	716
Omaha & Lincoln Railway & Light Co., Richey v.	847
Otto, Sandall v.	263
Palmer v. Palmer	741
Patterson v. Morehead	760
Peoples Furniture & Carpet Co., Wunrath v.	539
Perfection Remedy Co., Allaire, Woodward & Co. v.	726
Petersen, Johnson v.	255
Peterson v. Anderson	149
Phillips v. Union P. R. Co.	157
Pierson v. Lawler	783
Plamondon v. Lindsey	318
Polk County Telephone Co., Marquis v.	140
Powell v. Cone	562
Radcliffe v. Lavery	31
Rankin v. Kountze Real Estate Co.	69
Raymond Township, State v.	788
Reudelhuber v. Douglas County	687
Richards v. Chicago, R. I. & P. R. Co.	505
Richardson County, Miles v.	294
Richey v. Omaha & Lincoln Railway & Light Co.	847
Rickert v. Union P. R. Co.	304
Riley, Whittier v.	104
Riley v. Whittier	107
Rine v. Rine	225
Rine v. Steinacker	225
Robbins v. City of Omaha	439

	PAGE
Roberts v. State	199
Roden v. Williams	46
Rogers, Crinkley v.	647
Rookstool v. Cudahy Packing Co.	118, 851
Roper v. Milbourn	739
Ryan v. Bullion	705
Sadt v. Sunderland Bros. Co.	350
Sambo, Hauth v.	160
Sandall v. Otto	263
Sanitary District, Sternberger v.	449
Schminke v. Sinclair	101
Selicow v. Dunn	615
Selicow, In re Application of	615
Shallenberger, Home Savings Bank v.	113
Shapiro v. Omaha & C. B. Street R. Co.	452
Sievers, Uttley v.	59
Sinclair, Schminke v.	101
Skillicorn, Crowell v.	429
Slimmer v. Hoffman	330
Smith v. Goodman	284
Smith v. Lohr	4
South Omaha, City of, Wiese v.	492
Space, Bentley v.	486
Specht, Younie v.	133
Spratlen v. Ish	844
Spratt, Nelson v.	690
Standard Land Co., Nutter v.	548
Standard Oil Co., State v.	826
Stanton County, State v.	747
State, Casper v.	367
State v. Chicago, R. I. & P. R. Co.	268
State, Coons v.	414
State v. Gage County	753
State, Goemann v.	772
State, Hall v.	84
State, Holland v.	444
State, Roberts v.	199
State v. Standard Oil Co.	826
State v. Stanton County	747
State, Steinkuhler v.	95
State v. Supreme Forest, Woodmen Circle	632
State Bank v. Huffman	396
State, ex rel. Barnum, v. Omaha & C. B. Street R. Co.	716
State, ex rel. Crosby, v. Moorhead	298
State, ex rel. De Bolt, v. Kelly	619
State, ex rel. Diemer, v. Frye	364
State, ex rel. Gantz, v. Drainage District	625
State, ex rel. Halligan, v. Clary	324

	PAGE
State, ex rel. Lutt, v. Raymond Township.....	788
State, ex rel. Nebraska State Railway Commission, v. Missouri P. R. Co.	700
State, ex rel. Parks Co., v. Dahlman	416
State, ex rel. Rohrs, v. Harris	745
State, ex rel. Vannatter, v. McDonald	332
State, ex rel. Wookey, v. Elifritz	320
State, ex rel. Woolridge, v. Morehead	864
State Ins. Co., Brady v.	497
Steinacker, Rine v.	225
Steinkuhler v. State	95
Stephenson v. Germania Fire Ins. Co.	456
Sternberger v. Sanitary District	449
Stoica v. Swift & Co.	434
Streit, Fassler v.	722
Sunderland Bros. Co., Sadt v.	350
Supreme Court Commissioners, In re	426
Supreme Forest, Woodmen Circle, State v.	632
Swift & Co., Miller v.	44
Swift & Co., Stoica v.	434
Taylor v. Keneston	730
Thornton v. Kingrey	525
Tomlinson, Hiatt v.	51
Underwood v. Chicago & N. W. R. Co.	275, 507
Union P. R. Co., Campbell v.	375
Union P. R. Co., Henderson v.	734
Union P. R. Co., Kriss v.	801
Union P. R. Co., Phillips v.	157
Union P. R. Co., Rickert v.	304
Union Stocks Yards Co., Hanley v.	232
Uttley v. Sievers	59
Van Dorn v. Kimball	590
Vetter v. Broadhurst	356
Wallace v. Cox	601
Whittier v. Riley	104
Whittier, Riley v.	107
Wiese v. City of South Omaha	492
Wiig v. American Ins. Co.	271
Wiig v. Girard Fire & Marine Ins. Co.	271
Williams, Roden v.	46
Wiseman v. Carter White Lead Co.	534
Wunder v. Crane	446
Wunrath v. Peoples Furniture & Carpet Co.	539
Wurdeman v. City of Columbus	134
Younie v. Specht	133

CASES CITED BY THE COURT

CASES MARKED * ARE OVERRULED IN THIS VOLUME
CASES MARKED † ARE DISTINGUISHED IN THIS VOLUME

	PAGE
Aachen & Munich Fire Ins. Co. v. City of Omaha, 72 Neb. 518	187
Adair v. United States, 208 U. S. 161	91
Adams v. Dennis, 76 Neb. 682	448
Adams Express Co. v. Croninger, 226 U. S. 491	247
Affholder v. State, 51 Neb. 91	520
Agnew v. Montgomery, 72 Neb. 9	332
Ahrens v. Ahrens, 144 Ia. 486	787
Albert v. Twohig, 35 Neb. 563	746
Allan v. Kennard, 81 Neb. 289	520
Allen v. City of Milwaukee, 128 Wis. 678	140
Allen v. Kirk, 219 Pa. St. 574	489
Altschuler v. Algaza, 16 Neb. 631	58
American Building & Loan Ass'n v. Bear, 48 Neb. 455	411
American Car & Foundry Co. v. Armentraut, 214 Ill. 509	122
American Surety Co. v. Vinsonhaler, 92 Neb. 1	101
Anderson v. Union Stock-Yards Co., 84 Neb. 305	741
†Andresen v. Jetter, 76 Neb. 520	161
Andrews v. Hastings, 85 Neb. 548	374
Andrews v. Lindley, 63 Neb. 692	769
Apking v. Hoefer, 74 Neb. 325	46
Argabright v. State, 49 Neb. 760	691
Armaindo v. Ferguson, 55 N. Y. Supp. 769	523
Armenti v. Brooklyn Union Gas Co., 142 N. Y. Supp. 420	129
Armstrong v. Mayer, 60 Neb., 423	520
Arnold v. National Starch Co., 194 N. Y. 42	524
Ashland Land & Live Stock Co. v. May, 51 Neb. 474	811
Atchison & N. R. Co. v. Washburn, 5 Neb. 117	249
Atchison, T. & S. F. R. Co. v. State, 23 Okla. 210	703
Atlantic Coast Line R. Co. v. North Carolina Corporation Commis- sion, 206 U. S. 1	472, 703
Atwood v. Atwater, 34 Neb. 402	617
Ault v. Nebraska Telephone Co., 82 Neb. 434	250
Baldwin v. Douglas County, 37 Neb. 283	750
Bankers Life Ins. Co. v. County Board of Equalization, 89 Neb. 469	35
Darr v. Lamaster, 48 Neb. 114	109

	PAGE
Bartels v. State, 91 Neb. 575	780
Bartels Northern Oil Co. v. Jackman, 29 N. Dak. 236	828
Battle Creek Valley Bank v. Collins, 3 Neb. (Unof.) 38	331
Bauer v. Dewey, 166 N. Y. 402	569
Beatrice Paper Co. v. Beloit Iron Works, 46 Neb. 900	746
Beber v. Brotherhood of Railroad Trainmen, 75 Neb. 183	644
Becker v. Linton, 80 Neb. 655	347
Bement v. Smith, 15 Wend. (N. Y.) 493	729
Bemis v. City of Omaha, 81 Neb. 352	157
Benwood v. Public Service Commission, 83 S. E. (W. Va.) 295....	143
Bergmann v. Koehn, 99 Neb. 525	162
Berry v. Hoeffner, 56 Me. 170	610
Berryman v. Schalander, 85 Neb. 281	52
Bigler v. Baker, 40 Neb. 325	660
Billings v. German Ins. Co., 34 Neb. 502	460
Binder v. National Masonic Accident Ass'n, 127 Ia. 25	680
Binfield v. State, 15 Neb. 484	204
Bishop v. Fuller, 78 Neb. 259	152
Blaco v. State, 58 Neb. 557	484
Blake v. Chambers, 4 Neb. 90	448
Blakeslee v. Make-Man Tablet Co., 175 Ill. App. 515	507
Blondel v. Bolander, 80 Neb. 531	797
Blondin v. Brooks, 83 Vt. 472	332
Bloom v. Franklin Life Ins. Co., 97 Ind. 478	578
Board of Education v. Moses, 51 Neb. 288	518
Board of Health v. Teutonia Bank & Trust Co., 137 La. 422	483
Braceville Coal Co. v. People, 147 Ill. 66	90
Brandt v. State, 80 Neb. 843	616
Breedlove v. Gates, 91 Neb. 765	198
Brome v. Cuming County, 31 Neb. 362	62
Brown v. Chicago, B. & Q. R. Co., 88 Neb. 604.....	316
Brown v. Douglas County, 98 Neb. 299	37
Buckmaster v. McElroy, 20 Neb. 557	59
Buffalo German Ins. Co. v. Title Guaranty & Trust Co., 99 N. Y. Supp. 883	483
*Burnett v. State, 86 Neb. 11	772
Burtis v. New York C. & H. R. R. Co., 143 N. Y. Supp. 145	395
Burwell Irrigation Co. v. Lashmett, 59 Neb. 605	172, 177
Byard v. Holmes, 34 N. J. Law, 296	411
 Cadwell v. Smith, 83 Neb. 567.....	 50
Cain v. City of Omaha, 42 Neb. 120	496
Callies v. Modern Woodmen of America, 98 Mo. App. 521.....	825
Campbell v. American Handle Co., 117 Mo. App. 19	663
Capital Lumbering Co. v. Learned, 36 Or. 544	614
Carr v. State, 23 Neb. 749	774

	PAGE
Carson v. Godley, 26 Pa. St. 111	81
Casteel v. Pittsburg Vitrified Paving & Building Brick Co., 83 Kan. 533	122
Chafin v. Waukesha County, 62 Wis. 463	334
Chapman v. Forbes, 123 N. Y. 532	569
Chase v. Miles, 43 Neb. 686	24
Chase v. New York C. & H. R. R. Co., 208 Mass. 137	317
Chesapeake & O. R. Co. v. Cowley, 166 Fed. 283	737
Chesley v. Rocheford & Gould, 4 Neb. (Unof.) 768	395
Chicago, B. & Q. R. Co. v. Curtis, 51 Neb. 442	250
Chicago, B. & Q. R. Co. v. Gardiner, 51 Neb. 70	250
Chicago, B. & Q. R. Co. v. Kellogg, 54 Neb. 127	809
Chicago, B. & Q. R. Co. v. Kellogg, 54 Neb. 138	204
Chicago, B. & Q. R. Co. v. Kellogg, 55 Neb. 748	803
Chicago, B. & Q. R. Co. v. Metcalf, 44 Neb. 848	198
Chicago, B. & Q. R. Co. v. Munger, 168 Fed. 690	317
Chicago, B. & Q. R. Co. v. Railroad Com. of Wis., 237 U. S. 220....	474
Chicago, B. & Q. R. Co. v. Wilgus, 40 Neb. 660	393
Chicago, B. & Q. R. Co. v. Wymore, 40 Neb. 645	392
Chicago, B. & Q. R. Co. v. Yost, 61 Neb. 530	317
Chicago & E. I. R. Co. v. Chancellor, 165 Ill. 438	317
Chicago, R. I. & P. R. Co. v. Collier, 1 Neb. (Unof.) 278	250
Chicago, R. I. & P. R. Co. v. McCarty, 49 Neb. 475	158
Chicago, R. I. & P. R. Co. v. Sporer, 69 Neb. 8.....	316
Chicago, St. P. M. & O. R. Co. v. Elliott, 5 C. C. A. 347	846
Chicago, St. P. M. & O. R. Co. v. Kroloff, 217 Fed. 525.....	13
Childs v. State, 34 Neb. 236	774
Choctaw, O. & G. R. Co. v. McDade, 112 Fed. 888	737
Choctaw, O. & G. R. Co. v. McDade, 191 U. S. 64	738
Cittadino v. Schackter, 83 N. J. Law, 593.....	524
City Nat. Bank v. Goodloe-McClelland Commission Co., 93 Mo. App. 123	28
City of Anadarko v. Swain, 42 Okla. 741	443
City of Brownville v. Cook, 4 Neb. 101	334
City of Central City v. Marquis, 75 Neb. 233	746
City of Chadron v. Dawes County, 82 Neb. 614	752
City of Denver v. Mullen, 7 Colo. 345	533
City of Fresno v. Fresno Canal & Irrigation Co., 98 Cal. 179	533
City of Kenosha v. Kenosha Home Telephone Co., 149 Wis. 338	143
City of Lexington v. Kreitz, 73 Neb. 770	522
City of Lincoln v. Lincoln Gas & Electric Light Co., 100 Neb. 182..	189
City of Nampa v. Nampa & Meridian Irrigation District, 19 Idaho, 779	537
City of New Orleans v. Stewart, 18 La. Ann. 710	421
City of Omaha v. Hodgskins, 70 Neb. 229	752
City of Omaha v. Richards, 49 Neb. 244	443

	PAGE
City of Peoria v. Simpson, 110 Ill. 294	569
City of Seattle v. Kelleher, 195 U. S. 351	495
City of Springville v. Fullmer, 7 Utah, 450	534
Clark v. Nash, 198 U. S. 361	359
Clark Implement Co. v. Wiltfang, 87 Neb. 796	341
Clark & French v. Tennant, 5 Neb. 549	412
Clemence v. City of Auburn, 66 N. Y. 334	130
Cleve v. Chicago, B. & Q. R. Co., 77 Neb. 166	13
Cleveland, C. C. & St. L. R. Co. v. Illinois, 177 U. S. 514	474
Cline v. Dexter, 72 Neb. 619	347
Cobb v. Macfarland, 87 Neb. 408	660
Coble v. Coble, 79 N. Car. 589	814
Cole v. German Savings & Loan Society, 59 C. C. A. 593	846
Cole v. Parker, 70 Mo. 372	374
Coleman v. McGrew, 71 Neb. 801	448
Coleman v. Pennsylvania R. Co., 242 Pa. St. 304	251
Commissioner of Banking v. Chelsea Savings Bank, 161 Mich. 691	483
Commonwealth v. Green, 1 Ashm. (Pa.) 289	59
Commonwealth v. Kneeland, 20 Pick. (Mass.) 206	56
Commonwealth v. Perry, 155 Mass. 117	90
Coppell v. Hall, 7 Wall. (U. S.) 542	408
Cornelius v. Hultman, 44 Neb. 441	169
Cottrell v. State, 9 Neb. 125	704
Cowan v. State, 22 Neb. 519	774
Cox v. Royal Tribe, 42 Or. 365	302
Cram v. Chicago, B. & Q. R. Co., 84 Neb. 607	470
Crancer Co. v. Cooper, 98 Neb. 153	335
Cubbison v. Beemer, 81 Neb. 824	446
Culwell v. Franks, 3 Ind. T. 548	323
Daily v. Boudreau, 231 Ill. 228	374
Damkroeger v. James, 95 Neb. 784	660
Davis v. Chamberlain, 51 Or. 304	372
Davis v. Chesapeake & O. R. Co., 122 Ky. 528	251
Davis v. Connecticut Fire Ins. Co., 158 Cal. 766	275
Davis v. Manning, 97 Neb. 658; 98 Neb. 707	82
Davis v. Manning, 98 Neb. 707	845
Davis v. Modern Woodmen of America, 98 Mo. App. 713	578
Davis v. Neligh, 7 Neb. 84	776
Davis v. State, 31 Neb. 247	213
Dawson County v. Clark, 58 Neb. 756	746
De France v. Harmer, 66 Neb. 14	59, 301
De Groat v. Focht, 37 Okla. 267	28
DeSoto Coal Mining & Development Co. v. Hill, 179 Ala. 186	126
Dickson v. Stewart, 71 Neb. 424	665
Distilled Spirits, 11 Wall. (U. S.) 356	825
Dixon County v. Halstead, 23 Neb. 697	35
100 Neb. B.]	

	PAGE
Dobry v. Western Mfg. Co., 58 Neb. 667	177
Donahue v. Potter & George Co., 63 Neb. 128	665
Doran v. Waterloo, C. F. & N. R. Co., 170 Ia. 614	170
Dore v. Omaha & C. B. Street R. Co., 97 Neb. 250	732
Dorsey v. Wellman, 85 Neb. 262	821
Downey v. Northern P. R. Co., 19 N. Dak. 621	473
Downs v. Knights of Columbus, 76 N. H. 165	825
Drake v. Board of Education, 208 Mo. 540	565
Dunbar v. Briggs, 18 Neb. 94	58
Dyckman v. Sevatson, 39 Minn. 132	504
Eckhard v. Eckhard, 29 Neb. 457	323
Eddy v. German Ins. Co., 51 Neb. 291	2
Edwards v. New York & H. R. Co., 98 N. Y. 245	82
Egner v. Curtis, Towle & Paine Co., 96 Neb. 18	697
Egyptian Packing Co. v. Olney Gas Co., 183 Ill. App. 417	851
Eickhoff v. Elkenbary, 52 Neb. 332	609
Elliott v. General Construction Co., 93 Neb. 453	835
Ellis v. Emanuel, 1 Exch. Div. (Eng.) 157	483
Emberson v. Adams County, 93 Neb. 823	52
Evans Laundry Co. v. Crawford, 67 Neb. 153	159
Ewald v. Boyd, 24 S. Dak. 16	612
Ex parte Gist, 26 Ala. 156	302
Ex parte Rushforth, 10 Ves., Jr. (Eng.) 409	483
Ex parte Thomason, 16 Neb. 238	618
Farman v. Chamberlain, 74 Ind. 82	673
Farmer, Thompson and Helsell v. Bank of Graettinger, 130 Ia. 40	28
Farmers & Merchants Ins. Co. v. Newman, 58 Neb. 504	460
Farmers Mutual Ins. Co. v. Home Fire Ins. Co., 54 Neb. 740	458
Farnham v. Camden & A. R. Co., 55 Pa. St. 53	249
Faulkner v. Rondoni, 104 Cal. 140	372
Featherman v. Hennessy, 42 Mont. 535	372
Felton v. United States, 96 U. S. 699	55
Fidelity & Casualty Co. v. Martin, 163 Ky. 12	838
Fineran v. Central Bitulithic Paving Co., 116 Ky. 495	140
First Nat. Bank v. Buttery, 17 N. Dak. 326	27
First Nat. Bank v. Golder, 89 Neb. 377	402
First Nat. Bank v. Goodman, 55 Neb. 409	58
First Nat. Bank v. Hedgecock, 87 Neb. 220	47
Fischer v. Kram, 63 Neb. 241	402
Fisher v. Bountiful City, 21 Utah, 29	536
Fitzgerald v. Union Stock Yards Co., 89 Neb. 393	161, 732
Flege v. State, 93 Neb. 610	779
Flynn v. Finch, 137 Ia. 378	490
Foot & Co. v. Stanley, 232 U. S. 494	828
Fortier v. The Fair, 153 Ill. App. 200	123

	PAGE
Fortune v. Hall, 122 App. Div. (N. Y.) 250; 195 N. Y. 578	122
Fort Wayne & N. I. T. Co. v. Schoeff, 56 Ind. App. 540	317
Francis v. Flinn, 118 U. S. 385	43
Franklin State Bank v. Chaney, 94 Neb. 1	24, 424
Franklin State Bank v. Gettle, 96 Neb. 60	24, 424
Frederick v. City of Seattle, 13 Wash. 428	495
Friedman Co. v. Atlas Assurance Co., 133 Mich. 212	273
Funke v. Allen, 54 Neb. 407	729
Funke Estate v. Law Union & Crown Ins. Co., 97 Neb. 412	645
Gage v. Atchison, T. & S. F. R. Co., 91 Kan. 253	317
Gage County v. Wright, 86 Neb. 436	52
Galt v. Hildreth, 100 Neb. 15	422
Gaster v. Gaster, 92 Neb. 6	702
Gerner v. Yates, 61 Neb. 100	81
Glick v. Cumberland & W. E. R. Co., 124 Md. 308	317
Godfrey v. White, 60 Mich. 443	109
Gompers v. Buck Stove & Range Co., 221 U. S. 418	43
Goodman v. Smith, 94 Neb. 227	285
Grant v. Bartholomew, 57 Neb. 673	35
Graves v. Key City Gas Co., 83 Ia. 714	851
Gray v. Seckham, L. R. 7 Ch. (Eng.) 680	483
Gregsten v. City of Chicago, 145 Ill. 451	532
Gresham v. Equitable Accident Ins. Co., 87 Ga. 497	578
Grimm v. Omaha Electric Light & Power Co., 79 Neb. 387	159
Gurley v. Hiteshue, 5 Gill (Md.) 217	490
Hadley v. Union P. R. Co., 99 Neb. 349	158
Hajsek v. Chicago, B. & Q. R. Co., 5 Neb. (Unof.) 67	316
Hall's Appeal, 60 Pa. St. 458	320
Hamblin v. State, 81 Neb. 148	267
Hankins v. Reimers, 86 Neb. 307	121, 854
Hanover Fire Ins. Co. v. Gustin, 40 Neb. 828	461
Hanson v. Hanson, 78 Neb. 584	256
Harrington v. Rutland R. Co., 89 Vt. 112	317
Harvey v. Texas & P. R. Co., 166 Fed. 385	737
Hayes v. Silver Creek & Panoche Land & Water Co., 136 Cal. 238. 372	372
Hellman v. Adler & Sons Clothing Co., 60 Neb. 580	286
Henderson v. Goforth, 34 S. Dak. 441	372
Henni v. Fidelity Building & Loan Assn, 61 Neb. 744	251
Hennies v. Vogel, 87 Ill. 242	812
Herpolsheimer v. Acme Harvester Co., 83 Neb. 53	729
Hespen v. Wendeln, 85 Neb. 172	661
High Court, I. O. F., v. Schweitzer, 171 Ill. 325	825
High School District v. Lancaster County, 60 Neb. 147	155
Highway Commissioners v. Ely, 54 Mich. 173	59
Hinkson v. Morrison, 47 Ia. 167	613

	PAGE
Hoffard v. Illinois C. R. Co., 138 Ia. 543	316
Hoffman v. Hoffman, 15 Ohio St. 427	322
Hoffman & Place v. Aetna Fire Ins. Co., 32 N. Y. 405	644
Holmvig v. Dakota County, 90 Neb. 576	297
Home Fire Ins. Co. v. Weed, 55 Neb. 146	502
Home Telephone & Telegraph Co. v. City of Los Angeles, 211 U. S. 265	143
Hooker v. Hammill, 7 Neb. 231	614
Hooker v. Wabash R. Co., 99 Neb. 13	382
Hoopes v. City of Omaha, 99 Neb. 460	495
Hoover v. De Klotz, 89 Neb. 146	576
Horst v. Lewis, 71 Neb. 365	166
Houston & T. C. R. Co. v. Mayes, 201 U. S. 321	474
Huber Mfg. Co. v. Silvers, 85 Neb. 760	425
Huda v. American Glucose Co., 154 N. Y. 474	523
Humphrey v. Merriam, 32 Minn. 197	412
Iler v. Ross, 64 Neb. 710	872
Inland Steel Co. v. Yedinak, 172 Ind. 423	122
In re Application of McMonies, 75 Neb. 702	618
In re Balcom, 12 Neb. 316	618
In re Berger, 84 Neb. 128	98
In re Estate of Pulling, 93 Mich. 274	345
In re Fenton, 109 N. Y. Supp. 321	302
In re Greaser, 72 Neb. 612	616
In re Langston, 55 Neb. 310	618
In re O'Hara, 82 N. Y. Supp. 293	876
In re Supreme Court Commissioners, 37 Neb. 655	427
In re Van Sciever, 42 Neb. 772	616
In re Will of Donnely, 68 Ia. 126	800
Insurance Co. v. Crunk, 91 Tenn. 376	274
International Harvester Co. v. Industrial Commission of Wiscon- sin, 157 Wis. 167	436
Iowa Savings Bank v. Dunning & Hartson, 37 Neb. 322	336
Irwin v. Mayor, 57 Ala. 6	421
Isaac v. Halderman, 76 Neb. 823	798
Isaacs v. Isaacs, 71 Neb. 537	348
Ittner Brick Co. v. Killian, 67 Neb. 589	197
Ives v. Wisconsin C. R. Co., 128 Wis. 357	316
Jackson v. Washington County, 34 Neb. 680	790
Jacobs v. Gibson, 77 Mo. App. 244	27
Jakway v. Proudfit, 76 Neb. 62	412
Jameson v. People, 16 Ill. 257	328
Jenal v. Green Island Draining Co. 12 Neb. 163	362
Jennings v. Jennings, 56 Ia. 288	322
Johns v. City of Pendleton, 66 Or. 182	137

	PAGE
Johnson v. State, 53 Neb. 103	444
Johnston v. Chicago, B. & Q. R. Co., 70 Neb. 364	13
Johnston v. Delano, 100 Neb. 192	382
Johnston v. Delano, 154 N. W. (1a.) 1013	198
Jones v. Bates, 26 Neb. 693	165
Jones v. Town of Tonawanda, 158 N. Y. 438	495
Jordan v. Jordan, 4 Tex. Civ. App. 559	323
Kane v. Jonasen, 55 Neb. 757	770
Kansas & C. P. Co. v. Fitzgerald, 33 Neb. 137	173
Karren v. Karren, 25 Utah, 87	322
Keist v. Chicago G. W. R. Co., 110 Ia. 32	737
Kemmerling v. State, 89 Neb. 98	341
King v. Wilson, 98 Va. 259	565
Klafl v. Pratt, 117 Va. 739	320
Kline v. Kline, 57 Pa. St. 120	345
Knaff v. Knoxville Banking & Trust Co., 133 Tenn. 655	483
Knights of Pythias v. Withers, 177 U. S. 260	825
Koester v. Chicago & N. W. R. Co., 106 Wis. 460	317
Kofka v. Rosicky, 41 Neb. 328	228, 661
Kopplekom v. Huffman, 12 Neb. 95	58
Kovarick v. Saline County, 86 Neb. 440	295
Kramer v. Bankers Surety Co., 90 Neb. 301	166
Kramer v. Weigand, 91 Neb. 47	58
Krecek v. Supreme Lodge, F. U. A., 95 Neb. 428	821
Kreigh v. Westinghouse, Church, Kerr & Co., 214 U. S. 249	738
Kresge v. Maryland Casualty Co., 154 Wis. 627	569
Krier v. Milwaukee N. R. Co., 139 Wis. 207	267
Krummack v. Missouri P. R. Co., 98 Neb. 773	395
Lacey v. Zeigler, 98 Neb. 380	226
La Dow v. North American Trust Co., 113 Fed. 13	825
Lake v. State, 18 Fla. 501	301
Lake Erie & W. R. Co. v. Pence, 24 Ind. App. 12	317
Lamb v. Lamb, 130 Ind. 273	345
Lancaster County v. Green, 54 Neb. 98	52
Lancashire Ins. Co. v. Bush, 60 Neb. 116	683
Langenfeld v. Union P. R. Co., 85 Neb. 527	391
Lantry v. Wolff, 49 Neb. 374	373
Laughlin v. Schuyler, 1 Neb. 409	770
Lawson v. Gibson, 18 Neb. 137	746
Leathers v. Blackwell Durham Tobacco Co., 144 N. Car. 330	122
Lee v. People, 53 Colo. 507	323
Leming v. Sale, 123 Ind. 317	322
Lenahan v. Pittston Coal Mining Co., 218 Pa. St. 311	122
Levy v. Salt Lake City, 5 Utah, 302	536
Lewis v. North, 62 Neb. 552	660

	PAGE
Lillie v. McMillan, 52 Ia. 463	613
Lincoln Gas & Electric Light Co. v. City of Lincoln, 182 Fed. 926 ..	184
Lincoln Gas & Electric Light Co. v. City of Lincoln, 223 U. S. 349 ..	190
Lincoln Realty Co. v. Garden City Land & Immigration Co., 94 Neb. 346	656
Link v. Campbell, 72 Neb. 307	58
Little v. Giles, 25 Neb. 313	102
Logan v. Guichard, 159 Cal. 592	372
Lombard v. West Chicago Park Commissioners, 181 U. S. 33	495
Londoner v. City and County of Denver, 210 U. S. 373	495
Longmont Nat. Bank v. Loukonen, 53 Colo. 489	28
Loosing v. Loosing, 85 Neb. 66	102
Lorenzen v. Kansas City Investment Co., 44 Neb. 99	412
Loso v. Lancaster County, 77 Neb. 466	687
Louisville, H. & St. L. R. Co. v. Lyons, 155 Ky. 396	122
Louisville & Jeffersonville Ferry Co. v. Commonwealth, 104 Ky. 726 ..	59
Louisville & N. R. Co. v. Dickerson, 191 Fed. 705	3
Lukehart v. State, 91 Neb. 220	732
McCook Irrigation & Water Power Co. v. Burtless, 98 Neb. 141 ...	144
McCormick v. Catholic Relief & Beneficiary Ass'n, 39 App. Div. (N. Y.) 309	825
McGlave v. Fitzgerald, 67 Neb. 417	448
McLaughlin v. Armfield, 58 Hun (N. Y.) 376	524
M'Mahon v. Allen, 12 How. Pr. (N. Y.) 39	569
McManus v. Hornaday, 124 Ia. 267	495
McMullen v. Hoffman, 174 U. S. 639	408
McNally v. Standard Railway Equipment Co., 165 Ill. App. 371	123
McNees v. McNees, 97 Ky. 152	322
Madden, Son & Co. v. Wilcox, 174 Ind. 657	123
Magneau v. City of Fremont, 30 Neb. 843.....	187
Malorca v. Myers, 115 N. Y. Supp. 923	524
Malin v. La Moure County, 27 N. Dak. 140	768
Manning v. Ayers, 77 Fed. 690	663
Marino v. Lehmaier, 173 N. Y. 530	128
Martin v. Harvey, 89 Neb. 173	821
Martin v. State, 63 Miss. 505	813
May v. May, 9 Neb. 16	672
Mayor & City Council of Baltimore v. Ulman, 79 Md. 469	495
Mazon v. Case Threshing Machine Co., 81 Neb. 546	157
Merchants Trust Co. v. Bentel, 10 Cal. App. 75	569
Merriam Mortgage Co. v. St. Paul Fire & Marine Ins. Co., 97 Kan. 190	2
Michaelson v. Beemer, 72 Neb. 761	618
Milwaukee Electric Ry. & Light Co. v. Railroad Commission, 153 Wis. 592	143

	PAGE
Mines v. Phee, 254 Ill. 60	345
Minier v. Burt County, 95 Neb. 473	519
Minneapolis & St. L. R. Co. v. State of Minnesota, 193 U. S. 53	703
Missouri, K. & T. R. Co. v. Haber, 169 U. S. 613	248
Missouri-Lincoln Trust Co. v. Long, 31 Okla. 1	28
Missouri P. R. Co. v. Kansas, 216 U. S. 262	473, 703
Missouri P. R. Co. v. State of Nebraska, 217 U. S. 196	702
Missouri P. R. Co. v. Vandeventer, 26 Neb. 222	249
Modern Woodmen of America v. Breckenridge, 75 Kan. 373	825
Modern Woodmen of America v. Colman, 64 Neb. 162	826
Modern Woodmen of America v. Colman, 68 Neb. 660	820
Modern Woodmen of America v. Lane, 62 Neb. 89	825
Moline v. Carlson, 92 Neb. 419	228, 660
Moline Scale Co. v. Beed, 52 Ia. 307	729
Mondou v. New York, N. H. & H. R. Co., 223 U. S. 1	248
Moore v. Crandall, 205 Fed. 689	673
Moore v. Spier, 80 Ala. 129	800
Moore v. State, 64 Neb. 557	98
Moran v. Dickinson, 204 Mass. 559	863
Moran v. Plankinton, 64 Mo. 337	614
Morrill v. Jones, 106 U. S. 466	872
Mueller v. Jordon Shoe Co., 143 Ill. App. 332	123
Mugler v. Kansas, 123 U. S. 623	535
Murdock v. Murdock, 219 Ill. 123	345
Murray v. New York Life Ins. Co., 96 N. Y. 614	578
Murray v. Swanson, 18 Mont. 533	3
National Bank v. Cooper, 86 Neb. 792	397
National Bank of Commerce v. Kenney, 98 Tex. 293	27
Navajo County Bank v. Dolson, 163 Cal. 485	28
Neal v. Suber, 56 S. Car. 298	109
Nebraska Loan & Building Ass'n v. Perkins, 61 Neb. 254	301
Nelson v. Nelson, 95 Neb. 523	283
Newell v. Detroit, G. H. & M. R. Co., 187 Mich. 697	395
New England Loan & Trust Co. v. Kenneally, 38 Neb. 895	459
New Orleans v. Fisher, 180 U. S. 185	752
Norman v. Walte, 30 Neb. 302	281
Norris v. City of Lincoln, 93 Neb. 658	186
Northwestern Mutual Life Ins. Co. v. Mallory, 93 Neb. 579	410
Norval v. Zinsmaster, 57 Neb. 158	323
Nuding & Schlouch v. Ulrich, 169 Pa. St. 289	673
Nunnely v. Southern Iron Co., 94 Tenn. 397	409
O'Connor v. Waters, 88 Neb. 224	228, 661
Ogle Co-Operative House Furnishing Co. v. Shauman. 188 Ill. App. 4	507
Oleson v. Oleson, 90 Neb. 738	732
Olson v. Nebraska Telephone Co., 83 Neb. 735	250

	PAGE
Omaha & C. B. Street R. Co. v. City of Omaha, 90 Neb. 6.....	532
Omaha & R. V. R. Co. v. Chollette, 41 Neb. 580	674
Omaha & R. V. R. Co. v. Crow, 47 Neb. 84	250
Omaha & R. V. R. Co. v. Talbot, 48 Neb. 627	192
Omaha Street R. Co. v. Duvall, 40 Neb. 29	510
Order of Columbus v. Fuqua, 60 S. W. (Tex. Civ. App.) 1020	825
Owens v. Travelers Ins. Co., 99 Neb. 560.....	644
 Pacific Express Co. v. Cornell, 59 Neb. 364.....	300
Parker v. Simonds, 8 Met. (Mass.) 205.....	610
Patrick v. Leach, 8 Neb. 530.....	58
Patterson v. Adan, 119 Minn. 308.....	838
Pavey v. Braddock, 170 Ind. 178.....	421
Paxton & Hershey Irrigating Canal & Land Co. v. Farmers & Mer- chants Irrigation & Land Co., 45 Neb. 834.....	362
People v. Alturas County, 6 Idaho, 418.....	328
People v. Brooks, 1 Denio (N. Y.) 457.....	59
People v. Draper, 63 Hun (N. Y.) 389.....	59
People v. Gillson, 109 N. Y. 389.....	90
People v. Hayne, 83 Cal. 111.....	427
People v. Herlihy, 72 N. Y. Supp. 389.....	59
People v. Mahaney, 13 Mich. 481.....	301
People v. Marx, 99 N. Y. 377.....	872
People v. Maynard, 15 Mich. 463.....	328
People v. Sommer, 106 N. Y. Supp. 190.....	872
People v. Therrien, 80 Mich. 187.....	57
Peoria Mfg. Co. v. Huff, 45 Neb. 7.....	297
Perry v. Tozer, 90 Minn. 431.....	128
Peterson v. Bauer, 83 Neb. 405.....	661
Peterson v. State, 63 Neb. 251.....	772
Pettit v. Black, 13 Neb. 142.....	273
Phillips v. Dorris, 56 Neb. 293.....	109
Phoenix Ins. Co. v. Barnd, 16 Neb. 89.....	460
†Phoenix Mutual Life Ins. Co. v. City of Lincoln, 87 Neb. 626.....	569
Pickering v. Moore, 67 N. H. 533.....	109
Pickrell v. Carlisle, 135 Ky. 126.....	533
Pierce v. Pierce, 71 N. Y. 154.....	345
Pigeon v. Fuller, 156 Cal. 691.....	589
Pinoza v. Northern Chair Co., 152 Wis. 473.....	123
Platte & Denver Canal & Milling Co. v. Dowell, 17 Colo. 376.....	535
Platte & Denver Canal & Milling Co. v. Lee, 2 Colo. App. 184.....	535
Platte v. Southern Photo Material Co., 4 Ga. App. 159.....	122
Pollard v. McKenney, 69 Neb. 742.....	650
Pollock v. City of Kansas City, 87 Kan. 205.....	140
Ponting v. Isaman, 7 Idaho, 581.....	57
Powers v. Fletcher, 84 Ind. 154.....	673

	PAGE
Pratt v. Dwelling House Mutual Fire Ins. Co., 130 N. Y. 206.....	130
Pringle v. Modern Woodmen of America, 76 Neb. 384, 388.....	825
Prusa v. Everett, 78 Neb. 250.....	448
Queatham v. Modern Woodmen, 148 Mo. 33.....	302
Quinn v. Eggleston, 76 Neb. 409.....	692
Randall v. National Building, Loan & Protective Union, 43 Neb. 876	427
Rankin v. Schiereck, 166 Ia. 10.....	345
Reams v. Sinclair, 97 Neb. 542.....	612
Reasoner v. Yates, 90 Neb. 757	656
Reavis v. Horner, 11 Neb. 479.....	609
Red "C" Oil Mfg. Co. v. Board of Agriculture, 222 U. S. 380.....	828
Reed v. Rice, 48 Neb. 586.....	180
Rich v. Chicago, M. & St. P. R. Co., 149 Fed. 79.....	316
Richards v. Inter Ocean Newspaper Co., 181 Ill. App. 515.....	506
Rieger v. Schaible, 81 Neb. 33	343
Rine v. Rine, 91 Neb. 248.....	227
Roberts v. Lemont, 73 Neb. 365.....	318
Roche v. Union Trust Co., 52 N. E. (Ind. App.) 612.....	673
Roper v. Milbourn, 93 Neb. 809.....	739
Roper v. Milbourn, 98 Neb. 466.....	740
Rose v. King, 49 Ohio St. 213.....	521
Rosebloom v. State, 64 Neb. 342.....	186
Rudolph v. Landwerlen, 92 Ind. 34.....	814
Rumsey v. People, 19 N. Y. 41.....	328
Runge v. Brown, 23 Neb. 817.....	410
Russell v. Cedar Rapids Ins. Co., 78 Ia. 216.....	461
Ryerson v. Brown, 35 Mich. 333.....	362
St. Joseph & G. I. R. Co. v. Palmer, 38 Neb. 463.....	250
Sanderson v. Herman, 108 Wis. 662.....	495
San Diego Land & Town Co. v. Jasper, 189 U. S. 439.....	146
Saunders v. City of Iowa City, 134 Ia. 132.....	137
Savage v. Jones, 225 U. S. 501.....	248
Schaaake v. Dolley, 85 Kan. 598.....	875
Schafer v. Schafer, 71 Neb. 708.....	746
Scharpf v. Schmidt, 172 Ill. 255.....	787
Schintgen v. City of LaCrosse, 117 Wis. 158.....	495
Schlemme v. Omaha Gas Mfg. Co., 4 Neb. (Unof.) 817.....	331
Schmuck v. Hill, 2 Neb. (Unof.) 79	58
Schneider v. Plum, 86 Neb. 129.....	496
Schneringer v. Schneringer, 81 Neb. 661.....	650
School District v. Coleman, 39 Neb. 391.....	365
Schrandt v. Young, 62 Neb. 254.....	614
Scofield v. Clark, 48 Neb. 711.....	425

	PAGE
Scribner State Bank v. Ransom, 35 S. Dak. 244.....	872
Scully v. Williamson, 26 Okla. 19.....	655
Search v. Miller, 9 Neb. 26.....	58
Seaton Mountain Electric Light, Heat & Power Co. v. Idaho Springs Investment Co., 49 Colo. 122.....	851
Sedgwick v. Dixon, 18 Neb. 545.....	3
Seele v. State, 85 Neb. 109.....	95
Selover v. Bryant, 54 Minn. 434.....	170
Seyfer v. Otoe County, 66 Neb. 566.....	294
Shull v. Barton, 58 Neb. 741.....	301
Shults v. Chicago, B. & Q. R. Co., 83 Neb. 272.....	391
Sibert v. Hostick, 91 Neb. 255.....	645
Sickles v. Manhattan Gas-Light Co., 64 How. Pr. (N. Y.) 33.....	851
Siegel v. City of Chicago, 223 Ill. 428.....	140
Simpson v. Shepard, 230 U. S. 352.....	145
Simpson v. Simpson's Ex'rs, 94 Ky. 586.....	345
Slingerland v. Slingerland, 115 Minn. 270.....	345
Smith v. Chicago, St. P., M. & O. R. Co., 99 Neb. 719.....	297
Smith v. Dunn, 27 Ala. 315.....	109
Smith v. Garbe, 86 Neb. 91.....	341
Smith v. Gibson, 25 Neb. 511.....	664
Smith v. Scott, 93 Wis. 453.....	568
Smith's Adm'r v. National Coal & Iron Co., 135 Ky. 671.....	122
Smith Bros. Loan & Trust Co. v. Weiss, 56 Neb. 210.....	771
Smith Bros. v. Woodward, 94 Neb. 298.....	341
Smullin v. Wharton, 73 Neb. 667.....	647
Smyth v. Ames, 169 U. S. 466.....	146
Southern P. R. Co. v. Schuyler, 227 U. S. 601.....	248
Spencer v. Merchant, 125 U. S. 345.....	495
Spencer v. Scovill, 70 Neb. 87.....	103
Spies v. People, 122 Ill. 1.....	782
Squires v. Miller, 173 Mich. 304.....	167
Stanton v. Driffkorn, 83 Neb. 36.....	490
Starnes v. Albion Mfg. Co., 147 N. Car. 556.....	122
State v. Adams County, 15 Neb. 568.....	362
State v. Alcorn, 78 Tex. 387.....	57
State v. Bartles Oil Co., 132 Minn. 138.....	828
State v. Benton, 33 Neb. 823.....	62
State v. Board of County Commissioners, 98 Minn. 89.....	176
State v. Boyd, 63 Neb. 829.....	187
State v. City of Des Moines, 96 Ia. 521.....	328
State v. Clarke, 98 Neb. 566.....	790
State v. Compton, 28 Neb. 485.....	365
State v. Cook, 174 Mo. 100.....	872
State v. Cornell, 50 Neb. 526.....	520
State v. Crinklaw, 40 Neb., 759.....	618

100 NEB.] CASES CITED BY THE COURT . xxvii

	PAGE
State v. Cumiskey, 97 Kan. 343.....	828
State v. Decker, 77 Neb. 33	617
State v. District Court of Blue Earth County, 102 Minn. 482.....	495
State v. Dodge County, 20 Neb. 595.....	35
State v. Donahue, 91 Neb. 311.....	55
State v. Douglas County, 18 Neb. 601.....	747
State v. Dunn, 76 Neb. 155	746
State v. Ewing, 22 Kan. 708.....	752
State v. Gage County, 100 Neb. 753.....	750
State v. Grove, 77 Wis. 448.....	334
State v. Hastings, 37 Neb. 96.....	57
State v. Howard, 96 Neb. 278.....	702
State v. Insurance Co. of North America, 71 Neb. 320.....	186
State v. Lee, 29 Minn. 445.....	334
State v. McLean County, 11 N. Dak. 356.....	328
State v. Majors, 85 Neb. 375.....	519
State v. Meek, 148 Ia. 671.....	56
†State v. Morehead, 99 Neb. 146.....	868
State v. Nast, 209 Mo. 708.....	302
State v. Nebraska Telephone Co., 17 Neb. 126.....	851
State v. Noble, 118 Ind. 350.....	426
State v. Poynter, 59 Neb. 417.....	828
State v. Preston, 34 Wis. 675.....	56
State v. Robitshek, 60 Minn. 123.....	334
State v. Ryan, 92 Neb. 636.....	758
State v. Savage, 65 Neb. 714.....	828
State v. Scates, 43 Kan. 330.....	57
State v. Scott, 70 Neb. 684	631
State v. Sheldon, 10 Neb. 452.....	59
State v. Smith, 35 Neb. 13.....	702
State v. Sperry & Hutchinson Co., 94 Neb. 785.....	91, 767
State v. Stanton County, 100 Neb. 747.....	753
State v. Strait, 94 Minn. 384.....	876
State v. Taylor, 208 Mo. 442.....	876
State v. Thomas, 76 Kan. 447.....	3
State v. Troup, 98 Neb. 333.....	547
State v. Ure, 91 Neb. 31.....	520
State v. Wise, 12 Neb. 313.....	149
State v. Wyandotte County Gas Co., 88 Kan. 165.....	143
State Bank v. Seward County, 95 Neb. 665.....	37
State Ins. Co. v. Schreck, 27 Neb. 527.....	460
Stehle v. Jaeger Automatic Machine Co., 220 Pa. St. 617.....	122
Steinwender-Stoffregen Coffee Co. v. Guenther Grocery Co., 80 S. W. (Ky.) 1170	663
Stenberg v. State, 50 Neb. 127.....	493
Stetson v. Riggs, 37 Neb. 797.....	411

	PAGE
Stevens v. Carson, 30 Neb. 544.....	58
Stevens v. Modern Woodmen of America, 127 Wis. 606.....	825
Stevenson v. Omaha Transfer Co., 87 Neb. 794.....	402
Stewart v. Barton, 91 Neb. 96.....	519
Stitzel v. Miller, 250 Ill. 72.....	28
Stoltenberg v. State, 75 Neb. 631.....	692
Storrs v. Grand Trunk W. R. Co., 142 Mich. 375.....	317
Strafford v. Republic Iron & Steel Co., 238 Ill. 371.....	122
Strahl v. Miller, 97 Neb. 820.....	520
Stratton v. Nye, 45 Neb. 619	812
Sullivan v. Learned, 49 Ind. 252.....	322
†Sullivan v. Radzuweit, 82 Neb. 657.....	161
Sumner & Co. v. Colfax County, 14 Neb. 524.....	38
Supreme Council, C. B. L., v. Boyle, 10 Ind. App. 301.....	825
Supreme Lodge, Knights of Honor, v. Davis, 26 Colo. 252.....	825
Supreme Tent, K. M. W., v. Volkert, 25 Ind. App. 627.....	825
Sutton v. McConnell, 46 Wis. 269.....	334
Syms v. Mayor, 105 N. Y. 153.....	565
Talbott v. Butte City Water Co., 29 Mont. 17.....	372
Taylor v. Guest, 58 N. Y. 262.....	412
Taylor v. Wilson, 17 Neb. 88.....	700
Teel v. Miles, 51 Neb. 542.....	615
Teske v. Dittberner, 70 Neb. 544.....	647, 660
Texas & P. R. Co. v. Fenwick, 34 Tex. Civ. App. 222.....	251
Texas & P. R. Co. v. Swearingen, 196 U. S. 51.....	737
Thomas v. Central of G. R. Co., 121 Ga. 38.....	317
Thompson v. Gaffey, 52 Neb. 317.....	6
Tilton v. Tilton, 130 Ky. 281.....	345
Tinney v. Stebbins, 28 Barb. (N. Y.) 290.....	109
Tischner v. Rutledge, 35 Wash. 285.....	565
Tracy v. Commonwealth, 76 S. W. (Ky.) 184.....	59
Train v. Holland Purchase Ins. Co., 62 N. Y. 598.....	130
Trainor v. Maverick Loan & Trust Co., 92 Neb. 821.....	332, 729
Transatlantic Ins. Co. v. Bamberger, Bloom & Co., 11 Ky. Law Rep. 101	273
Travelers Ins. Co. v. Seaver, 19 Wall. (U. S.) 531.....	578
Traver v. Merrick County, 14 Neb. 327.....	362
Triska v. Miller, 86 Neb. 503.....	729
Tucker v. Draper, 62 Neb. 66	443
Tucker v. Henniker, 41 N. H. 317.....	813
Turner v. Grimes, 75 Neb. 412.....	504
Tuttle v. Polk & Hubble, 84 Ia. 12.....	496
Union P. R. Co. v. Metcalf & Wood, 50 Neb. 452.....	250
United Railways & Electric Co. v. Crain, 123 Md. 332.....	378
United States v. Kirby, 7 Wall. (U. S.) 482.....	470

	PAGE
United States v. Morris, 39 U. S. *464.....	671
United States Electric Lighting Co. v. Metropolitan Club, 6 App. D. C. 536.....	851
U. P. Steam Baking Co. v. Omaha Street R. Co., 4 Neb. (Unof.) 396	740
Upton v. Betts, 59 Neb. 724.....	24
 Vallancy v. Hunt, 26 N. Dak. 611.....	614
†Vanderpool v. Partridge, 79 Neb. 165.....	698
Van Horn v. State, 46 Neb. 62.....	300
 Wadhams Oil Co. v. Tracy, 141 Wis. 150.....	329
Wallace v. Cox, 92 Neb. 354; 94 Neb. 194.....	601
Wallace v. Sheldon, 56 Neb. 55	2
Wallenburg v. Missouri P. R. Co., 86 Neb. 642.....	377
Ward v. Aetna Life Ins. Co., 82 Neb. 499.....	267
Ward v. Aetna Life Ins. Co., 91 Neb. 52.....	741
Wardell v. McConnell, 23 Neb. 152.....	165
Warner's Estate, 207 Pa. St. 580.....	345
Warner v. Warner, 235 Ill. 448.....	345
Warren v. Street Commissioners, 187 Mass. 290.....	495
Washington Ice Co. v. Webster, 125 U. S. 426.....	611
Wass v. Stephens, 128 N. Y. 123.....	56
Waters v. Hardt, 87 Neb. 636	397
Weitz v. Wolfe, 28 Neb. 500.....	28
Welton v. Dickson, 38 Neb. 767.....	361
Wenninger v. Lincoln Traction Co., 84 Neb. 385.....	402
West Chicago Park Commissioners v. Farber, 171 Ill. 146.....	495
Western Assurance Co. v. Mohlman Co., 28 C. C. A. (U. S.) 157....	273
Western Mattress Co. v. Potter, 1 Neb. (Unof.) 627.....	58
Western Union Telegraph Co v. City of Fremont, 39 Neb. 692.....	187
Western Union Telegraph Co. v. Douglas County, 76 Neb. 666.....	37
White, Adm'r, v. Smith, 39 Kan. 752.....	412
Whitmore, Rauber & Vicinus v. Edgerton, 149 N. Y. Supp. 508.....	136
Whitney v. State, 53 Neb. 287.....	774
Wiese v. City of South Omaha, 85 Neb. 844.....	493
Wilkinson v. Lord, 85 Neb. 136.....	62
Willcox v. Consolidated Gas Co. 212 U. S. 19.....	146
Williams v. Williams, 13 Ind. 523.....	322
Willy v. Mulledy, 78 N. Y. 310.....	524
Wilson v. Mason, 158 Ill. 304.....	656
Winslow v. Baltimore & O. R. Co., 188 U. S. 646.....	565
Woodmen of the World v. Hipp, 147 S. W. (Tex. Civ App.) 316....	578
Wunderle v. Wunderle, 144 Ill. 40.....	787
Wyandotte County Gas Co. v. State of Kansas, 231 U. S. 622.....	143

	PAGE
Yall v. Snow, 201 Mo. 511.....	521
Yates v. Jones Nat. Bank, 74 Neb. 734.....	332, 730
Yick Wo v. Hopkins, 118 U. S. 356	90, 872
Young v. Rohrbough, 84 Neb. 448.....	80
Young v. Rohrbough, 88 Neb. 279.....	81
 Zancanella v. Omaha & C. B. Street R. Co., 93 Neb. 774.....	 316
Zelinko v. Peabody, 5 Neg. and Comp. Cas. Ann., p. 825, note....	438
Zimmerman v. Trude, 80 Neb. 503.....	520
Zumbro v. Parnin, 141 Ind. 430.....	176
Zweiner v. Vest, 96 Neb. 399.....	373

STATUTES AND CONSTITUTIONAL PROVISIONS CITED AND CONSTRUED

NEBRASKA

CONSTITUTION

	PAGE
Art. I, sec. 1	767
Art. I, sec. 3	89
Art. I, sec. 5	39
Art. I, sec. 13	768
Art. I, sec. 24	426
Art. II	298
Art. III, sec. 4	756
Art. III, sec. 11	298, 629, 704
Art. VI, sec. 2	759
Art. IX, sec. 1	187, 827
Art. XI, sec. 4	248

SESSION LAWS

1879

P. 366, sec. 37	59
P. 393, sec. 153	61

1885

Ch. 55	753
Ch. 55, sec. 3	754

1887

Ch. 48	753
--------------	-----

1895

Ch. 23	325
Ch. 65	63

1903

Ch. 73, sec. 121	35
Ch. 73, secs. 122-124	36

1907

Ch. 54, sec. 2	746
Ch. 90, sec. 7	704
Ch. 122	153
Ch. 153, sec. 20	625
Ch. 162	616

1909

	PAGE
Ch. 106, secs. 1-3	700
Ch. 117, subd. 3	365

1911

Ch. 56, sec. 1	516
Ch. 64, sec. 14	517
Ch. 111	53
Ch. 145, sec. 44	625
Ch. 205	519

1913

Ch. 198, sec. 39	232
Ch. 252	149

1915

Ch. 50, sec. 11	762
Ch. 50, sec. 106a	769
Ch. 86	756
Ch. 120	149
Ch. 170, secs. 1, 6	93
Ch. 170, sec. 2	84
Ch. 170, sec. 9	85
Ch. 212, sec. 3	419
Ch. 212, sec. 6	421
Ch. 224, sec. 1	298
Ch. 224, sec. 2	300
Ch. 247	547

ANNOTATED STATUTES

1903

Sec. 4918	349
-----------------	-----

1911

Secs. 10094, 10095	747, 754
--------------------------	----------

COMPILED STATUTES

1887

Ch. 79, sec. 4, subd. 1	365
-------------------------------	-----

1901

Ch. 77, art. I, sec. 70	35
-------------------------------	----

1905

Ch. 13, art. II, sec. 128, subds. III, XXVII	496
Ch. 13, art. II, sec. 128, subds. IV, XVIII	492

1907

Ch. 79, sec. 22, subd. XIII	519
-----------------------------------	-----

1911

Ch. 71, sec. 1a	55
-----------------------	----

GENERAL STATUTES

1873

	PAGE
Ch. 31	753
Ch. 31, secs. 46, 47	747

REVISED STATUTES

1866

Ch. 19, sec. 35, p. 172	59
-------------------------------	----

1913

Secs. 234, 239	873
Sec. 294	871
Sec. 295	867
Sec. 361	690
Secs. 965, 2461	60
Secs. 1089, 1090, 2956	53
Sec. 1162	199
Sec. 1272	349
Sec. 1314	373
Sec. 1560	671
Secs. 1561, 1562	672
Sec. 1578	321
Secs. 1797-1865	65, 174
Sec. 1830	628
Sec. 1858	64
Secs. 1866-1914	626
Secs. 1872, 1914, 3328	625
Secs. 2443, 5735	745
Sec. 2555	826
Sec. 2628	281
Secs. 2795-2820	764
Sec. 2899	791
Sec. 3049	689
Sec. 3187	456
Sec. 3210	501
Sec. 3321	460
Secs. 3428, 3430, 3431	358
Sec. 3444	357
Secs. 3551-3696	434
Sec. 3575	121, 856
Sec. 3576	121
Secs. 3577, 3578	857
Secs. 3579, 3585	858
Sec. 3586	859
Sec. 3587	125, 859
Sec. 3642	233
Sec. 3682	234

	PAGE
Sec. 3849	164
Secs. 3872, 5597	334
Sec. 4017, subd. 5	768
Sec. 4719	420
Sec. 4748	492
Sec. 4887	135
Sec. 4916	756
Sec. 4941	139
Sec. 5110	757
Sec. 5119	528
Sec. 5132	536
Sec. 5141	537
Sec. 5323	28
Sec. 5599	444
Secs. 5638, 7581	748
Secs. 5662-5684	298
Sec. 5698	51
Sec. 5738	746
Secs. 5927-5935	850
Sec. 5978	248
Secs. 5988-5990	700
Secs. 6018, 6019	462
Sec. 6023	375
Sec. 6063	1
Secs. 6067, 6074	269
Sec. 6124	144, 249
Secs. 6128, 6139	141
Sec. 6192	102
Sec. 6273	784
Secs. 6437, 6442	34
Sec. 6456	152
Sec. 6491	478
Sec. 6660	65
Sec. 6662	480, 484
Sec. 6663	66
Sec. 6703, subd. 3	364
Secs. 7604, 8176	567
Sec. 7609	175
Sec. 7640, subd. 6; sec. 7641	133
Sec. 7658	31
Secs. 7662, 7664	862
Sec. 7706	686
Sec. 7713	697
Sec. 7827	608
Secs. 7831, 7832	607
Sec. 7833	601

	PAGE
Sec. 7894	226, 647
Sec. 7898	647
Sec. 7909	847
Sec. 8168	507
Sec. 8198	410
Sec. 8207	285
Secs. 9124, 9185, 9269	617
Secs. 9145-9151	370

CODE

Sec. 329	226
----------------	-----

CRIMINAL CODE

Secs. 375, 483, 515	617
---------------------------	-----

UNITED STATES

CONSTITUTION

Amendment XIV	426, 767
Amendment XIV, sec. 1	91

STATUTES AT LARGE

Vol. 25, ch. 405, p. 888	789
Vol. 25, ch. 405, sec. 21, p. 897	788
Vol. 31, art. I, p. 1939	784
Vol. 31, ch. 832, sec. 4, p. 1084	790
Vol. 34, ch. 3591, sec. 5, p. 590	3
Vol. 34, ch. 3591, pp. 593-595	247
Vol. 34, ch. 3594, p. 607	277
Vol. 35, ch. 149, p. 65	157
Vol. 37, ch. 145, pp. 832, 833	84

AMENDMENT TO RULES OF THE SUPREME COURT

Rule 12, part (1), is amended so as to make the last paragraph read as follows:

"Every reference to an adjudicated case shall be by the title thereof, as well as by the volume and page where it may be found, indicating the tribunal, and the particular edition of any text-book referred to must be given in connection with the cited page or section thereof. Every reference to a statutory provision of Nebraska shall be to the edition of the Revised Statutes published by the state of Nebraska, if the provision is found therein, or to the session laws."

CASES DETERMINED
IN THE
SUPREME COURT OF NEBRASKA

JANUARY TERM, 1916.

**JAMES B. NORTHCUTT, APPELLEE, v. MISSOURI PACIFIC RAIL-
WAY COMPANY, APPELLANT.**

FILED JUNE 3, 1916. No. 18710.

Costs: ATTORNEY'S FEE. Under the statute making a common carrier liable for an attorney's fee in a suit wherein plaintiff recovers damages for the loss of, or injury to, freight, the supreme court is not authorized to allow plaintiff an attorney's fee for services on appeal. Rev. St. 1913, sec. 6063.

APPEAL from the district court for Otoe county: **JAMES T. BEGLEY, JUDGE.** Motion for allowance of attorney's fee. *Motion denied.*

B. P. Waggener, J. A. C. Kennedy and Philip E. Horan,
for appellant.

O. E. Leidigh and C. A. Robbins, contra.

PER CURIAM.

In the district court for Otoe county plaintiff, a consignee, recovered a judgment against defendant, a common carrier, for the loss of property in transit. Included in plaintiff's recovery was an attorney's fee allowed pursuant to statute. Rev. St. 1913, sec. 6063. Defendant appealed to this court, where the judgment of the district court was affirmed April 15, 1916, without an opinion. By motion plaintiff now asks for the allowance of an additional fee

100 NEB.] (1)

for the services of his attorney in this court. The motion is resisted on the ground that the supreme court has no authority to make such an allowance. The statute authorizing an attorney's fee in addition to plaintiff's claim for damages for the loss of, or injury to, freight provides: "In the event such claim, which shall have been filed as above provided within ninety days from the date of the delivery of the freight in regard to which damages are claimed, is not adjusted and paid within the time herein limited, such common carrier shall be liable for interest thereon at seven per cent. per annum from the date of the filing of such claim, and shall also be liable for a reasonable attorney's fee to be fixed by the court, all to be recovered by the consignee or consignor, or real party in interest, in any court of competent jurisdiction." Rev. St. 1913, sec. 6063.

May the supreme court, upon affirming a judgment against a common carrier for loss of, or damage to, property in transit allow plaintiff a reasonable attorney's fee for services on appeal in addition to that allowed by the district court? Such an allowance is purely statutory. *Wallace v. Sheldon*, 56 Neb. 55. A party asking for an attorney's fee as part of his recovery must bring his case within the terms of the statute. *Eddy v. German Ins. Co.*, 51 Neb. 291. In the case just cited it was held that a statute directing the court rendering judgment against an insurance company to allow plaintiff a reasonable attorney's fee to be taxed as part of the costs did not authorize the supreme court, in affirming a judgment against the insurer, to allow plaintiff a fee in addition to that allowed by the district court. To the same effect is *Merriam Mortgage Co. v. St. Paul Fire & Marine Ins. Co.*, 97 Kan. 190.

The expression "all to be recovered by the consignee or consignor," as used in the Nebraska statute, seems to indicate that the legislature intended to limit the allowance of the attorney's fee to the court rendering judgment for the items enumerated, namely, damages, interest, and attorney's fee. The statutory power of the district court

to allow plaintiff an attorney's fee upon rendering judgment for plaintiff does not confer upon the supreme court power, in the event of an affirmance, to allow an additional attorney's fee for services on appeal, though plaintiff, by reason of such appeal has been compelled to incur additional expenses for legal services. *Sedgwick v. Diron*, 18 Neb. 545; *Murray v. Swanson*, 18 Mont. 533; *State v. Thomas*, 76 Kan. 447.

Plaintiff relies upon *Louisville & N. R. Co. v. Dickerson*, 191 Fed. 705. The statute there construed provided, in a suit to enforce an order of the interstate commerce commission awarding reparation to plaintiff: "The petitioner shall not be liable for costs in the circuit court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit." 34 U. S. St. at Large, ch. 3591, sec. 5, p. 590. The court held that, upon affirming a judgment in favor of plaintiff, the circuit court of appeals was authorized to allow plaintiff a reasonable attorney's fee in addition to that allowed by the circuit court. The case is distinguishable. The federal statute contemplates the allowance of a reasonable attorney's fee, "if the petitioner shall finally prevail." The term "finally prevail" extends to the circuit court of appeals. If the petitioner shall finally prevail, he is entitled to an attorney's fee therein. The Nebraska statute contemplates that a reasonable attorney's fee shall be allowed as a part of the recovery, and it must therefore be allowed by the court rendering the judgment. An additional allowance in case of an unsuccessful appeal by the common carrier does not appear to have been contemplated by the legislature.

The motion is therefore

OVERRULED.

Smith v. Lohr.

ELBERT P. SMITH, APPELLEE, v. WILLIAM R. LOHR, APPELLANT.

FILED JUNE 3, 1916. No. 18866.

Contracts: BREACH: REMEDIES. On refusal to perform a contract for the exchange of properties, the injured party may, at his election, treat the contract as terminated and sue for the value of the property he has delivered to the defaulting party.

APPEAL from the district court for Custer county : BRUNO O. HOSTETLER, Judge. *Affirmed.*

Sullivan, Squires & Johnson, for appellant.

C. L. Gutterson and Frank Kelley, contra.

MORRISSEY, C. J.

Plaintiff was the owner of an undivided one-half interest in a merry-go-round, and defendant was the owner of a small house and lot in the village of Merna. They entered into an oral agreement under the terms of which plaintiff was to transfer his interest in the merry-go-round to the defendant, pay him \$100 in cash and give him a note and mortgage for \$300, and defendant was to convey the house and lot to plaintiff.

Plaintiff alleges that he delivered the merry-go-round to defendant, who took the same into his possession and operated it for two or three weeks, and that plaintiff took immediate possession of the house and lot; that he tendered \$100 to defendant, and was ready and willing to execute the note and mortgage, and demanded a deed to the house and lot from defendant, but that defendant failed to execute and deliver the deed; that defendant had not returned the merry-go-round, but, on the contrary, had disposed of the same, and prayed judgment for \$800, which he alleged to be the value of his interest in the merry-go-round.

The answer contains the usual formal admissions, with a general denial of the allegations not admitted, followed by the allegations that the merry-go-round was out of repair; that after an inspection he determined not to proceed further with the deal; followed by the specific allegation that defendant never took possession of the property; a denial that plaintiff ever took possession of the real estate, paid the \$100 in cash, or executed and delivered the note and mortgage; and pleaded affirmatively that, in due season, defendant had notified plaintiff that he would not make the exchange of property.

The reply was a denial of all new matter set out in the answer. There was a verdict and judgment for the plaintiff for \$286, and defendant has appealed.

There are two assignments of error. The first, that the court erred in giving instruction No. 8, which is as follows:

"You are instructed that, if from the evidence and instructions of the court you find for the plaintiff that the trade was agreed upon, and that defendant accepted and took possession of the merry-go-round, then you will find for the plaintiff and assess the amount of his recovery at one-half the fair reasonable market value of the swing at the time of the trade, if you believe a trade was agreed upon, with 7 per cent. interest from June 6, 1913."

First, it is complained that this instruction takes from the jury the question of whether Lohr had appropriated the merry-go-round to his own use. It is said that the answer in legal effect denies that he converted the merry-go-round, and that whether he had taken possession was an issue for the jury to determine, and that this instruction took this question away from the jury. This is a rather technical refinement. The testimony shows that at the time the negotiations were had the merry-go-round was at the town of Stapleton; that defendant, in company with the owner of the other one-half interest, took it out of its place of storage, set it up, operated it for two or three weeks, and retained the proceeds. It is neither alleged

nor shown that it was returned to the plaintiff. It being shown without question or dispute that defendant had gone thus far in taking it into his possession, and no attempt being made to show that he had returned the property to plaintiff, the jury could not have been misled by this instruction on the question of possession.

It is next said that the instruction lays down an erroneous rule as to the measure of damages. It will be noted that by this instruction the jury are left to ascertain the value of plaintiff's interest in the merry-go-round at the time it was taken over by defendant, and assess the damages accordingly. The point sought to be made is that plaintiff has not pleaded a rescission of the contract, and therefore cannot recover the value of the property parted with.

"On breach of contract the injured party has his choice of three remedies in a proper case. He may sue on the contract for the damages he has sustained by reason of the breach; or he may consider the contract terminated by the breach and sue on the *quantum meruit* under an implied contract and recover for his services and the amount expended by him on the contract; or he may have recourse to equity and compel a specific performance of the contract, notwithstanding the breach." 3 Elliott, Contracts, sec. 2095.

In *Thompson v. Gaffey*, 52 Neb. 317, it is said: "Where one party to an express contract is wrongfully prevented by the other party from completing, he may sue upon the contract for a breach thereof, and the measure of his damages will be the value of the part performed as measured by the contract price plus the profits, if any, which would have accrued to him had he completed the contract according to its terms; or he may ignore the contract and declare upon a *quantum meruit* or *quantum valebat*, in which case the measure of his damages will be the fair and reasonable value of what he has done."

The only other assignment relates to the sufficiency of the evidence to support the verdict. The proof is conclu-

Cohn v. Chicago & N. W. R. Co.

sive as to defendant having helped to set up the merry-go-round, helped to operate it for two or three weeks, he selling tickets and receiving the money the greater part of the time, and that he has never returned it to plaintiff. Defendant offered no proof as to the value. There is no dispute on that question, and, indeed, the proof would sustain a verdict for a greater amount.

Judgment is

AFFIRMED.

LOUIS COHN, APPELLEE, V. CHICAGO & NORTHWESTERN RAILWAY COMPANY, APPELLANT.

FILED JUNE 3, 1916. No. 18885.

1. **Carriers: DELAYED SHIPMENT: LIABILITY.** To entitle the plaintiff to recover for negligent delay in transporting an interstate shipment of live stock, it is necessary to introduce some competent evidence tending to show the length of time ordinarily required to transport the shipment from the place where it was received to the point of delivery, and that a longer time was actually consumed than was necessary for that purpose.
2. ———: ———: **REFUSAL TO WITHDRAW INSTRUCTION.** It is reversible error for the court to refuse to withdraw from the jury a charge of negligent delay in the transportation of live stock, where no competent evidence is introduced to support such a charge.
3. **Evidence examined, its substance set out in the opinion, and held** to be insufficient to support the verdict.

APPEAL from the district court for Douglas county:
GEORGE A. DAY, JUDGE. Reversed.

A. A. McLaughlin, Wymer Dressler and Lyle Hubbard,
for appellant.

A. L. Timblin and Charles L. Dundey, contra.

BARNES, J.

Plaintiff commenced this action in the county court of Douglas county against the Chicago & Northwestern Railway Company to recover damages which he alleged he had sustained to a shipment of horses from LaBeau, South Dakota, to South Omaha, in this state.

On a trial in the county court plaintiff had a judgment, and the defendant appealed to the district court. The case was tried in that court on a petition which alleged, in substance, that the shipment of horses in question was received by the Minneapolis & St. Louis Railroad Company, was transported by that company to Northville, in the state of South Dakota, and there delivered to the defendant company at about 6:30 p. m. on the 7th day of September, 1909; that the horses were transported from that point to the place of destination at South Omaha, Nebraska; that the distance from Northville, South Dakota, to South Omaha, Nebraska, over the line of defendant's railroad is about 352 miles, and the usual and necessary time for transporting live stock over said road between said points is not to exceed 30 hours, but that said horses did not reach South Omaha until about 6 a. m. on the 12th day of September, 1909, being in excess of 95 hours from the time said horses were received by the defendant for said transportation; that they were confined in the cars on the line of defendant's road for about 78 hours, of which time an excess of 12 hours was consumed in the yards of said company, and an excess of 65 hours running time on said road; that the delay in transportation of said horses occurred at Northville, South Dakota, and at various other points between Northville and South Omaha, the exact location of which points is not known to the plaintiff; that said horses were subjected to rough handling and careless and negligent treatment by the defendant between Redfield, South Dakota, and Huron, South Dakota, and at various other points between Northville and Redfield and between Huron and South Omaha. Plaintiff alleges that such rough handling and careless

and negligent treatment occurred at all points between Northville and South Omaha; that no part of such delay in transportation nor any part of the rough handling and careless and negligent treatment of said horses was in any manner the fault of the plaintiff; that, by reason of such unnecessary and unreasonable delay in transportation and such rough handling and careless and negligent treatment of said horses by the defendant, the plaintiff was damaged to the amount of \$801 by reason of the gaunt, stale, bruised and damaged condition of said horses. Plaintiff prayed judgment for said sum of \$801.

The defendant, by its answer, admitted that it was a common carrier, and that it received the shipment of horses at Northville, but denied all other allegations of the petition, and alleged that plaintiff accompanied the shipment as a caretaker, under the ordinary contract for that purpose, and that, if the plaintiff's horses were injured by delay or want of proper care, including feeding and watering, the same was not the fault of the defendant company, but was caused by the fault and neglect of the plaintiff, and not otherwise. The reply was, in substance, a general denial.

The cause was tried to a jury. The plaintiff had a verdict for \$1,065.31. Defendant's motion for a new trial was overruled. Judgment was rendered on the verdict, and the plaintiff was awarded an attorney's fee of \$150. The defendant has appealed.

Appellant, among other assignments of error, contends that the verdict of the jury is not sustained by sufficient evidence. It appears that plaintiff was his own witness and gave the only testimony in the record by which he sought to establish delay and rough handling of the horses in the matter of transportation. His evidence was, in substance, as follows: I had three car-loads of horses at LaBeau. I asked the agent at that point to wire to the defendant to stop its train and take them up at Northville. When I arrived at that point the defendant's train had gone. I hunted up the agent, and he wired the situ-

ation to the defendant company, and the conductor of the train came back from Redfield to Northville with his engine and crew. When they got there they unloaded the horses about midnight and placed them in the yards at that point. They were not fed or watered there. They were reloaded into the cars about noon the next day, and went on to Redfield, which was the next stop. The run from Northville to Redfield was pretty fair. The horses were taken into the train at Redfield and forwarded to Huron, arriving there about 7:30 p. m. of the same day. The run from Redfield to Huron was a local one. They were unloading fence posts all along the road. They shook my horses up and down every time they unloaded the posts. They jarred them to pieces. They had a gondola car, or open box car. I expect I rode in the caboose. They kept me delayed all the afternoon until night.

Regarding the question of feeding and watering the horses at Northville, the agent of the company and others who assisted in unloading them testified that they were watered; that they pumped the watering trough in the yards full and the horses drank. The testimony also showed that a load of hay was put into the stock-yards so that the horses could eat the same if they desired. The plaintiff admitted those facts upon cross-examination, but insisted that the water was poor and the horses did not drink it.

Regarding the run from Redfield to Huron, the conductor of the train in which the horses were placed testified that the run occupied practically just two hours; that he had no fence posts in the train at all; that his train sheet, made up by himself, on that day, showed "barley, shingles, barley, wheat, wheat, barley, lumber, barley, wheat, lumber, wheat, wheat, wheat, one empty box car, wheat, barley, wheat, barley, wheat, emigrants, lath, three cars horses;" that the three cars of horses were at the head end of the train next to the engine; that he had no company material or posts whatsoever, and did no work between Redfield and Huron on that trip; that they arrived at

Huron at 7 p. m.; that he had no gondola car on the train at all, and had no men or crew whatsoever with him for the purpose of throwing off posts or anything else. The chief train dispatcher for the defendant at Huron corroborated him and testified as to the record of the movement of the train. It appears that the distance from Redfield to Huron is 40.4 miles, and the actual running time of the train in which the horses were transported from Redfield to Huron was 2 hours and 14 minutes. This time included a stop at a railroad crossing just south of Redfield, which would take about five minutes; another crossing stop at Valley Junction to turn a switch and come into Huron on the main line. This would require about five minutes. They stopped at another point and registered, which time required about five minutes. So it was conclusively established that the actual running time for the 40.4 miles was 2 hours, or 20 miles an hour. It is therefore apparent that the defendant's train did not have a load of posts on the run from Redfield to Huron, and there was no delay on said run. It further appears that, when the train arrived at Huron, the defendant had other shipments of freight sufficient to make up a special train if plaintiff's horses were included therein. The train dispatcher desired to make up such a train and run the horses through without stopping. The plaintiff, however, refused to go forward, and insisted that the horses had not been fed or watered at Northville, and so the horses were unloaded at Huron, were placed in the defendant's yards, and were again fed and watered. The next morning they were taken into a train and forwarded to Hawarden, which is the next stop, or the termination of the division. The plaintiff testified that the run from Huron to Hawarden was a local one; that they took off merchandise and made stops according to the dispatcher's orders; that, aside from its being a local, it was a good run; just fair; nothing to brag of. Plaintiff further testified that they stopped in Hawarden only long enough to make up the train, and that they had a good run from

Hawarden to Alton; that they arrived there at 11 o'clock on September 9. At Alton the shipment was delivered to the Chicago, St. Paul, Minneapolis & Omaha Railway Company, and handled by that company to Sioux City. The horses were delivered at the Sioux City stock-yards early on the morning of September 10. They were cared for by the stock-yards company during that day, and reloaded and redelivered to defendant at Sioux City at 5 p. m. on September 10, 1909, and arrived at South Omaha at 6 o'clock on the morning of September 11, 1909, which was the usual and proper time for a run between Sioux City and South Omaha. When the horses arrived at South Omaha they were delivered by defendant to the Union Stock-Yards Company at 6 o'clock on the morning of September 11, 1909, and plaintiff did not see them upon their arrival, but saw them for the first time at South Omaha about noon on September 11. They were then in the stock-yard pens. Witnesses for the plaintiff testified that, when the horses were seen at the stock-yards at South Omaha, they were gaunt and looked as though they had had a long, hard run; that eleven head were somewhat badly skinned and bruised. There was no testimony as to what plaintiff paid for the horses when he bought them in South Dakota, and there was no evidence as to what they were worth at that point. There was some evidence as to what they would have been worth had they arrived in good condition at South Omaha, and there was evidence tending to show what they actually sold for. It appears that the only evidence tending to show any rough handling or neglect on the part of the defendant company was plaintiff's own testimony. There is no doubt but that the plaintiff suffered some slight damage in relation to the shipment of horses, but, as we view the evidence, it was clearly insufficient to sustain the amount of plaintiff's recovery. It further appears that plaintiff failed to attend to feeding and watering his horses, and that he obstructed the defendant while it was attempting to per-

form that duty. He was quarrelsome and abusive in his conduct toward the defendant's servants and agents.

The appellant requested the court to withdraw from the jury the question of negligent delay. Its request was refused. Considering the condition of the evidence, we are of opinion that the request should have been granted. The plaintiff's action was based in part on defendant's alleged negligent delay in transporting his horses from Northville, South Dakota, to South Omaha, Nebraska. As we view the record, the plaintiff failed to show any delay caused by unloading, feeding and watering his horses in Northville. On the contrary, the testimony clearly establishes the fact that the shipment reached Redfield in time to be taken by the first train out of that station after they reached Northville on the way to Huron. No delay was shown at either Northville or Redfield, and there was no testimony tending to show any delay in the transportation from Huron to the place of destination, which was South Omaha, Nebraska. In order to recover for such delay, it was necessary for him to introduce some competent evidence tending to show the length of time ordinarily required to transport a shipment from the place where received to the point of delivery, and that a longer time was actually consumed than was necessary for that purpose. *Johnston v. Chicago, B. & Q. R. Co.*, 70 Neb. 364; *Cleve v. Chicago, B. & Q. R. Co.*, 77 Neb. 166. In *Chicago, St. P., M. & O. R. Co. v. Kroloff*, 217 Fed. 525, it was held to be reversible error to refuse to withdraw unsupported charges of negligence from the jury. We are therefore of opinion that by refusing defendant's request the court committed reversible error.

The overwhelming weight of the evidence shows that plaintiff's horses were unloaded into the company's yards at Northville for that purpose about midnight of September 7; that they were fed and watered by persons who testified to that fact and who were wholly disinterested in the outcome of this litigation. It is true that the water was not the best, but it appears that other horses were kept

Cohn v. Chicago & N. W. R. Co.

in the yards and they drank the water. The testimony of the defendant's witnesses was that the horses in question drank when the watering troughs were filled. Again, the plaintiff testified on his direct examination that the horses were not unloaded, fed and watered on the night of the 8th at Huron, South Dakota. He admitted, however, on cross-examination, that he went to the hotel and went to bed before 12 o'clock that night; that he paid no attention to feeding and watering his horses, and insisted that it was up to the defendant to perform that duty, and the only reason he gave for his statement that they were not fed and watered was that he found the horses loaded in the cars ready to go forward the next morning at about 6 o'clock. Witnesses who were wholly disinterested in the result of this suit testified that they assisted in unloading, feeding and watering the horses at Huron. Therefore, that fact was clearly established.

On the question of rough handling, the evidence is not so clear, and it is possible that plaintiff might have been entitled to some recovery on that branch of the case, but the evidence does not sustain the amount of plaintiff's judgment.

As we view the record, the verdict of the jury was excessive. It seems apparent that defendant did not have a fair trial.

The judgment of the district court is reversed and the cause is remanded for further proceedings.

REVERSED.

SEDGWICK, J., dissenting.

The rule stated in *Johnston v. Chicago, B. & Q. R. Co.*, 70 Neb. 364, that there must be evidence of the length of time ordinarily required in a shipment, does not seem to me to be applicable in this case. The plaintiff alleged that the time usually required was 30 hours. The only answer made to this allegation is a general denial, which, of course, could be made if the time was 31 hours, but would not in such case constitute a defense. The defend-

Galt v. Hildreth.

ant should have alleged the regular time if it was much more than the time alleged by the plaintiff. The defendant in its answer said: "If said consignment of horses encountered any unnecessary delay," etc. This, together with its evasive denial, would in law amount to an admission that the time was at least very nearly as alleged by the plaintiff.

It would appear that this is the only point of law upon which the reversal is predicated. The first paragraph of the syllabus makes this the principal point determined, and it is said in the opinion: "In order to recover for such delay, it was necessary for him to introduce some competent evidence tending to show the length of time ordinarily required to transport a shipment from the place where received to the point of delivery." I suppose the second paragraph is predicated upon the first. The third paragraph simply says that the evidence does not support the verdict. Of course, that is for the reason stated in the first paragraph of the syllabus. As "the length of time ordinarily required to transport the shipment from the place where it was received to the point of delivery" is fixed by the pleadings,, I cannot see that the opinion states any ground for reversal.

FAWCETT, J., concurs.

AMOS A. GALT ET AL., APPELLEES, V. CARSON HILDRETH,
APPELLANT.*

FILED JUNE 3, 1916. No. 18938.

1. **Compromise and Settlement.** A settlement of a matter in controversy between the officers and directors of a bank on the one hand, and other persons interested as alleged debtors in the transaction on the other hand, where no fraud is alleged or proved, is binding on all parties to such settlement.

*Opinion modified. See opinion, p. 422, *post*.

Galt v. Hildreth.

2. **Banks and Banking: SALE OF STOCK: CONTRACT: ENFORCEMENT.** Where, in making a sale of bank stock, the president of the bank agreed to pay to the purchaser notes held by the bank on a given date amounting to \$3,000, to be selected by the purchaser, the contract may be enforced after the purchaser has exercised his right of selection.
3. ———: ———: ———. An agreement on the part of the seller to pay to the purchaser three-fifths of the difference between the profits of the bank for a designated year and \$8,000 net profit is an enforceable agreement.
4. ———: ———: **PROFITS.** In estimating the amount of the net profits, the guaranty fund required by the banking department to be set apart under the banking laws of the state may be deducted from the gross profits.
5. **Judgment: CONCLUSIVENESS.** The defense successfully made by one of the signers and indorsers of a note, if not made on purely personal grounds, will bar a future action by the same plaintiff on the same obligation against another joint defendant.

APPEAL from the district court for Lancaster county:
WILLARD E. STEWART, JUDGE. *Affirmed.*

Flansburg & Flansburg, for appellant.

Stewart & Stewart, contra.

BARNES, J.

This was an action brought in the district court for Lancaster county by Amos A. Galt and Reuben P. Galt against Carson Hildreth and the Franklin State Bank, to recover a balance alleged to be due on the following contract: "Carson Hildreth hereby gives the parties of the second part the privilege on January 1, 1913, of selecting notes to the value of \$3,000 out of the notes on hand belonging to the bank in the regular loans and discounts on November 10, 1911, and the said Carson Hildreth agrees to pay the bank the face value with accrued interest from November 10, 1911, to January 1, 1913, on said notes. It is further agreed that, if the net profits of the bank for the calendar year 1912 shall not equal \$8,000 after allowing salaries to the amount of \$3,600, the said Carson

Galt v. Hildreth.

Hildreth shall make good to the said second parties three-fifths of the amount of the deficiency, but if the net profits of the bank exceed \$8,000, then the second parties agree to pay to the said Carson Hildreth one-half of the three-fifths of said excess. It is further agreed that the said Carson Hildreth is to be retained as president of the said bank at a salary of \$50 per month to the end of the calendar year 1912."

Plaintiffs' amended petition alleged that the liability of Hildreth was to make good three-fifths of the deficit in the net profits of the bank for the year 1912, which was alleged to be \$5,000. The plaintiffs further alleged that they had selected certain notes, among which was a note made by one Curtis to the bank for \$2,100, which they insisted Hildreth should pay to the bank, and, in order that a recovery might be had in the suit, the Franklin State Bank was named as a party defendant.

To the amended petition the bank filed an answer and cross-petition, by which it adopted the contract between the Galts and Hildreth, which provided for the selection by the Galts of \$3,000 out of the notes on hand belonging to the bank in the regular loans and discounts on November 10, 1911, and which Hildreth, by his contract, agreed to pay with accrued interest from November 10, 1911, to January 1, 1913.

The cross-petition alleged that only \$514.70 was paid on March 12 and \$502.50 on February 5, 1913, on the Curtis note, leaving due the bank \$2,301.17 with interest from January 1, 1913, at 7 per cent. per annum. Hildreth by his answer alleged that he paid \$514.70 on March 12, 1912, and later on, in a settlement of the Curtis matters with the bank, he took up the note for \$2,100, and a note for \$152.50, which notes had been selected by plaintiffs under the contract, making in all a payment of \$2,767.20, leaving a balance only of \$232.80, and that plaintiffs had not selected any note of that amount, but, when so selected, Hildreth by his answer alleged he would pay the same under the contract. By his answer to the bank's first

Galt v. Hildreth.

cause of action, Hildreth alleged that the bank had settled with him in relation to the Curtis transaction. He alleged that the title to the Curtis land was taken to himself for the benefit of the bank to secure the debt of \$2,100; that the directors of the bank met on or about February 5, 1913, and agreed to exchange the Curtis land of 280 acres, free and clear of incumbrances, with one Deichen, for a mortgage of \$5,000 on said Curtis land to be executed by Deichen to the bank, and a transfer to the bank of the 160 acres of land owned by Deichen at an agreed valuation of \$7,000, with a \$1,000 mortgage thereon. Hildreth further alleged that he had made advances on account of the Curtis matters, which he estimated at \$1,576.46, without interest, and which did not include his personal expenses, admitted that he had received some rents from the Curtis farm, and alleged that it was finally by the directors agreed that he should receive \$1,500 for his claim out of the profits of the transaction, and in order to obtain possession of the two Curtis notes, which plaintiffs had requested him to pay to the bank, he paid \$502.50 to the bank in settlement of the balance of its claim against Curtis; that the aggregate of its claim, without interest, amounted to \$11,502.50; that the proceeds of the Deichen transaction yielded the bank \$11,000; that said transaction was completed, and that he paid the bank \$502.50 in full settlement of the Curtis account, receiving \$1,500 out of the profits from the bank, and thereupon conveyed the premises at the request of the bank to Deichen, and received the Curtis notes for \$2,100 and \$152.50 uncanceled, while at the same time all of the other Curtis notes were canceled and paid, and the Curtis land which had secured their payment was transferred by him to Deichen; that the settlement was full and complete so far as all of the Curtis notes were concerned.

It was alleged in the cross-petition of the bank that Hildreth, in June, 1909, had guaranteed the payment of the Curtis notes at the time he sold certain of the bank stock to other individuals. As to that guaranty, Hildreth

Galt v. Hildreth.

alleged that he had agreed that, if any loss accrued to the stockholders on account of such notes, he would make their share good to them without loss. He further alleged that at the settlement of the Curtis matter it was estimated that the bank would suffer a loss of \$1,000, and that he paid to the stockholders, to whom his guaranty was made, that sum in settlement of their demand.

By the bank's cross-petition it sought to recover from defendant Hildreth for and on account of a note for the sum of \$887.75, due July 6, 1904, with interest, which was signed by Carson Hildreth, W. H. Chaney and Thomas Gettle. It was alleged that Hildreth, in violation of his duty, failed to pay that note, but instituted a suit by the bank thereon, causing himself to be sued, together with the other makers; that Gettle and Chaney answered separately for themselves, denying their liability, and setting up as defenses to the action that the note was executed by them without consideration, and, further, that they had been released and discharged by the defendant subject to the execution thereof from all liability thereon. Upon trial, a verdict of the jury was rendered without special findings in their favor, and judgment was rendered thereon by the court. It was further alleged that defendant Hildreth prosecuted an appeal to the supreme court from that judgment, where the same was affirmed; that Hildreth did not answer in that action, but was in default, and therefore the judgment in that case did not release him from his liability for the payment on said note. Answering this cause of action, Hildreth denied that the bank had loaned him any money; admitted the execution of the note; admitted the guaranty indorsed by Gettle, Chaney, Doher and Hildreth; admitted the bringing of the suit in Franklin county in which the liability of Gettle, Doher, Chaney and Hildreth was alleged to be that of joint makers; admitted that Doher, Gettle and Chaney filed answers; admitted the execution and delivery of said note, but alleged that the Franklin State Bank and the other defendants had been interested

Galt v. Hildreth.

as creditors in the management of a brickyard which was turned over to them, the bank to the extent of \$1,000, Gettle \$500, Chaney \$200, and Doher \$200, secured by chattel mortgages which were superior to that of the bank; that it was agreed that the mortgages should be released, which was done, the bank agreeing to operate said property and pay the claim of the bank and the other creditors *pro rata* out of the profits. The answer alleged that the Franklin State Bank requested defendants to sign the note in suit as evidence of its interest in said property, and for its convenience; that it was also agreed that said note was of no force or effect except for the convenience of said bank in carrying its interest in said property on its books as a resource expressed in an item as a promissory note, rather than as a resource in an item of personal property; that the defendants received no money or credit, nor did any consideration whatever move from the plaintiff bank to the defendants or any one else for the same, and that the defendants received no benefit or consideration for signing said note.

There was a further plea of the statute of limitation. Replies were filed denying the allegations of the answer, and it was stipulated that the cause should be tried to the court on those issues. A trial was had, and the court by its decree found all of the issues in favor of defendant Carson Hildreth, and against the bank upon all causes of action set out in its cross-petition, "other than the right of said bank to compel specific performance of the condition of said contract for the payment by said Hildreth of certain promissory notes owned by said bank November 10, 1911, and to be designated by plaintiffs. The court finds that said plaintiffs designated the notes of C. P. Curtis, \$2,100, F. T. Burnham \$500, and Clement Chase \$500, of which the \$500 Chase note has been by said Carson Hildreth duly paid; and that said bank, as to the \$2,100 Curtis note, has by its own act placed it beyond its power to enforce collection thereof. The court finds that it is the right of the plaintiffs to designate \$2,500 of notes, includ-

Galt v. Hildreth.

ing the \$500 Burnham note, owned by said bank on November 10, 1911, within twenty days from the entry of this decree, and, upon failure of said Carson Hildreth to pay notes so selected by plaintiffs to the said bank, in the amount of \$2,500, with interest thereon from November 10, 1911, within forty days from the date of this decree, then defendant Franklin State Bank shall have judgment against said Carson Hildreth for said amount. The court further finds that, by the terms of the contract hereinbefore mentioned, the defendant Carson Hildreth agreed to pay said plaintiffs three-fifths of any deficiency in the net earnings of said bank for the year 1912, under the sum of \$8,000. The court finds that the net earnings, as aforesaid, amounted to the sum of \$5,562.10, and that plaintiffs are entitled to recover from the defendant Carson Hildreth, on account of such deficit, the sum of \$1,607.78." Judgment was entered on the findings, from which Hildreth appeals. Cross-appeals were likewise taken by the Galts and the bank from the decree which found in favor of Hildreth on the other issues.

The cross-appellants, Galt and the Franklin State Bank, each complains of the finding and decree of the trial court that Hildreth was not liable as guarantor for the payment of the Curtis notes. They contend that the finding on that question is not sustained by the evidence. The record discloses that in 1909 Hildreth was the owner of the majority of the stock of the bank, in fact was the owner of the bank. At that time the bank had among its assets the note of C. P. Curtis for \$2,100, secured by mortgage on his 280-acre farm. Hildreth had indorsed the note or guaranteed its payment. Curtis was largely indebted to other persons, and as a matter of precaution he was induced to make a deed of the farm to Hildreth, in order to prevent other creditors from obtaining liens thereon. Hildreth took the title to hold for the benefit of the bank. Certain persons had purchased some stock in the bank, and Hildreth at that time guaranteed that he would make good any loss they might sustain by reason of the trans-

Galt v. Hildreth.

action. In November, 1911, the Galts purchased a majority of the stock of the bank, and obtained from Hildreth the guaranty and agreement which is set out in the first part of this opinion. The Galts then took possession of the bank, and thereafter, with the directors, conducted its business. A short time before the meeting of the directors, which was held in February, 1913, an opportunity occurred for the bank to exchange the 280 acres of land, the title to which was held by Hildreth, with one Deichen, for 160 acres of land owned by him, on which there was a mortgage for \$1,000, and obtain the difference in value between the two tracts. Curtis and one Mahin, his attorney, went to Franklin, and the exchange was made. Hildreth, acting for the bank, conveyed the 280-acre farm to Deichen, and he executed a mortgage thereon for \$5,000 in favor of the bank. The Deichen land was conveyed to the bank at the agreed value of \$7,000; there still being a mortgage on the land for \$1,000. In order to even up the values, Curtis executed a note for \$2,000 to Mahin, which Hildreth guaranteed. When the directors of the bank met on February 3, 1913, the matter of the Curtis deal came up for consideration. The evidence shows that the transaction was approved and adopted. The value of the Curtis land was agreed to be \$11,500. Hildreth gave the bank his check for \$502.50, and surrendered all claims on the Curtis land, and was exonerated from all charges as to rents which he might have collected while he had possession of it. He was allowed \$1,500 for advances made by him on account of the transaction, and the whole matter was closed up. The minutes of the meeting are as follows:

“Special Directors’ Meeting, February 3, 1913.

“Meeting held to consider a proposition to trade the farm belonging to the bank near Gaylord, Kansas, to Mr. Deichen for his 160-acre farm near Reamsville, Kansas. It was voted to make the trade along the lines outlined in the option given by Mr. Deichen to the Bank.

“(Signed) R. P. Galt, Secy.”

Galt v. Hildreth.

The old notes were then canceled, with the exception of the Curtis note for \$2,100, and the small note for \$152.50. Those notes were not canceled, and Hildreth took possession of them without objections by any one. Hildreth testified to the foregoing facts, and his evidence was corroborated by the testimony of the directors, and in part by the Galts themselves. We are therefore of opinion that the evidence was sufficient to sustain the finding of the trial court on that issue.

Appellant Hildreth contends that the court erred in allowing the cross-appellants to select notes, other than the Curtis notes, to the amount of \$3,000 and require him to pay the same. On this question it may be said that the contract hereinbefore referred to does not mention any particular notes. It is an agreement on Hildreth's part to pay notes held by the bank on January 1, 1912, to the amount of \$3,000, with interest thereon. The Curtis notes having been paid in the manner above stated, the Galts were at liberty to select other notes to the amount which Hildreth had agreed to pay. We are therefore of opinion that the court was right in its judgment on that question.

Hildreth also contends that in estimating the net profits of the bank for the year 1912 the court erred in deducting the sum of \$723.06, which was the guaranty fund charged by the state against the bank under the existing banking laws. This sum was required to be set apart and segregated from the funds of the bank. The bank held it as a reserve fund for the payment of assessments under the provisions of the law, the state requiring it to be kept on hand at all times subject to call. This being so, we are unable to say that it was error for the court to deduct that amount from the profits of the bank. The parties on both sides are strenuous in their contentions as to the question of what should be considered as net profits for the year 1912, but, after considering all of their claims and the evidence contained in the record, we have concluded to adopt the finding of the trial court on that question.

This brings us to the consideration of the question of the liability of Hildreth to pay the bank the disputed items of the so-called brickyard notes.

It appears that the bank commenced an action on one of the brickyard notes, making Hildreth and all of the other joint makers defendants. The other defendants filed answers setting up as their defenses that there was no cause for the note; that the bank had taken over the brickyard and had conducted it for a time; that the enterprise had failed, and the bank had made certain payments on the notes out of the profits of the transaction, and therefore they were relieved from liability on the note. Hildreth filed no answer, but gave testimony on the trial which, if believed by the jury, would have authorized a judgment in favor of the bank. The jury found for the defendants, and judgment was rendered in their favor on the verdict. The bank appealed to this court, where the judgment was affirmed. *Franklin State Bank v. Chaney*, 94 Neb. 1. The bank then brought another action on one of the notes against another of the signers, and the same defense was pleaded. The jury found for the defendants, and judgment was rendered on the verdict. The bank appealed, and again the judgment was affirmed. *Franklin State Bank v. Gettle*, 96 Neb. 60.

It is contended by the bank that the judgment in those cases did not release Hildreth's liability on the notes because he did not answer in those cases. There is some conflict in the authorities, but in *Chase v. Miles*, 43 Neb. 686, it was said: "A judgment rendered by a court which had jurisdiction of the parties and of the subject-matter, as between such parties, conclusively settled all questions litigated."

In *Upton v. Betts*, 59 Neb. 724, it was held: "A matter in issue covered, either generally or specifically, by the decree of the court cannot be again litigated without a modification or vacation of that decree."

In the cases of the bank against Hildreth and others, no judgment was rendered against him. If Hildreth was

First Nat. Bank v. Baldwin.

an indorser and guarantor, that is, if he was an indorser with enlarged liability, the bank could not now sue him because the prior and subsequent indorsers were released by the jury and the judgments of the court in the actions on these notes. We are therefore of opinion that the district court was right in holding that the bank was not entitled to a judgment for the balance of the brick-yard notes.

Without further discussion of the issues involved in this suit, the judgment of the district court is

AFFIRMED.

SEDGWICK, J., concurs in the conclusion.

MORRISSEY, C. J., and LETTON, J., not sitting.

FIRST NATIONAL BANK OF SIDNEY, APPELLEE, v. J. C. BALDWIN ET AL., APPELLEES; J. M. SWENSON, APPELLANT.

FILED JUNE 3, 1916. No. 18941.

1. **Bills and Notes: NEGOTIABILITY.** A clause in a promissory note which reads as follows: "The makers and indorsers hereof waive demand, notice, and protest, and all defenses on the ground of any extension of the time of payment that may be given by the holders to them or either of them"—does not render the note non-negotiable.
2. ———: **ACTION: PARTIES.** A payee who indorses such a promissory note as follows: "I hereby guarantee payment of the within note and waive demand and notice of protest on same"—thereby assumes the liability of an indorser, and may properly be sued with the maker in the same action.
3. **Appeal: FINDINGS BY COURT.** The finding of a court in a law action based on conflicting evidence is entitled to the same weight as the verdict of a jury.

APPEAL from the district court for Cheyenne county:
HANSON M. GRIMES, JUDGE. *Affirmed.*

First Nat. Bank v. Baldwin.

C. Petrus Peterson, R. W. Devoe and J. M. Swenson, for appellant.

Wright & Mothersead, B. A. Jones and Miles & McIntosh, contra.

BARNES, J.

This is an appeal from the judgment of the district court for Cheyenne county. The action was brought by the First National Bank of Sidney, Nebraska, against J. C. Baldwin, J. M. Swenson and M. Radcliff on a promissory note which reads as follows:

"\$1,000. Sidney, Nebraska, Dec. 29, 1910.
"June 26, 1911, for value received, we jointly and severally promise to pay to the order of J. M. Swenson, of Sidney, one thousand and no/100 dollars at the First National Bank of Sidney, Nebraska, with interest at the rate of ten per cent. per annum from maturity until paid.

"The makers and indorsers hereof waive demand, notice, and protest, and all defenses on the ground of any extension of the time of payment that may be given by the holders to them or either of them. (Signed) J. C. Baldwin.

"M. Radcliff.

"No. 5605. Due June 26, 1911."

The note bore the following indorsement: "J. M. Swenson." There was also another indorsement as follows: "For value received I hereby guarantee payment of the within note and waive demand and notice of protest on same when due. (Signed) J. M. Swenson."

By agreement the cause was tried to the court, and resulted in judgment for the plaintiff and against Baldwin and Swenson. Swenson alone has appealed.

The answer admitted the execution, indorsement and delivery of the note to the plaintiff, but it was alleged by appellant that, subsequent to the maturity of the note, the plaintiff, without the knowledge and consent of the defendant, and for a valuable consideration, extended the time of payment thereof to the makers, by reason of

which he was released and discharged from the liability imposed upon him by his contract of guaranty. Swenson further alleged that, before the date of the maturity of the note set out in plaintiff's petition, to wit, June 26, 1911, and before any extension was made by the plaintiff for the time of payment of said note, he notified the plaintiff not to make any extension whatever for the payment thereof; that on the same day the maker of the note, J. C. Baldwin, applied for an extension in the time of payment for a period of six months; that, the plaintiff being desirous of granting an extension of time for a period of six months, it was then and there agreed by and between the plaintiff and this defendant, for and in consideration of this defendant's consenting to an extension for that length of time, that no further extension of time for payment of said note should be made by the said plaintiff to the makers thereof, after the expiration of six months, without the consent of the defendant; that, relying upon the terms of said contract, this defendant consented that the time of the payment of said note might be extended for a period of six months from June 26, 1911, and that thereupon this defendant indorsed his consent to said extension on the back of said note in words and figures followed, to wit:

"June 26, 1911.

"Please extend the within note for six months from this date. (Signed) J. M. Swenson."

The reply of the plaintiff was in effect a general denial.

The appellant contends that the note was not a negotiable instrument, and authorities from a few states are cited in support of his contention. On the other hand, it seems clear that a majority of the more recent authorities, and especially those under the present negotiable instruments law, clearly hold to the contrary. The clause waiving all defenses on the ground of extension of time has been held not to destroy the negotiability of the note. *First Nat. Bank v. Buttery*, 17 N. Dak. 326; *National Bank of Commerce v. Kenney*, 98 Tex. 293; *Jacobs v. Gibson*, 77 Mo.

First Nat. Bank v. Baldwin.

App. 244; *City Nat. Bank v. Goodloe-McClelland Commission Co.*, 93 Mo. App. 123; *Farmer, Thompson and Helsell v. Bank of Graettinger*, 130 Ia. 469; *Stitzel v. Miller*, 250 Ill. 72; *Navajo County Bank v. Dolson*, 163 Cal. 485; *Missouri-Lincoln Trust Co. v. Long*, 31 Okla. 1; *De Groat v. Focht*, 37 Okla. 267; *Longmont Nat. Bank v. Loukonen*, 53 Colo. 489.

By section 5323, Rev. St. 1913, it is provided: "An instrument which contains an order or promise to do any act in addition to the payment of money is not negotiable. But the negotiable character of an instrument otherwise negotiable is not affected by a provision which: * * * Third—waives the benefit of any law intended for the advantage or protection of the obligator." We therefore hold that the note in question was a negotiable instrument.

It is further contended by the appellant that there was a misjoinder of causes of action, in that the appellant could not be sued jointly with the makers of the note.

Again, this precise question was ruled on in *Weitz v. Wolfe*, 28 Neb. 500. In that case the payee of a note, when selling the same, indorsed it as follows: "I guarantee the payment of the within note, waiving demand and notice of protest." It was there held that the liability of the defendant was not that of a mere guarantor who could not be joined in the same action with the maker of the note, but, like the appellant in this case, was an indorser with an enlarged liability. Therefore the action was properly brought against the appellant and the makers of the note.

Appellant also contends that he had the right to forbid the bank from giving any extension of time for payment, and it is argued that no consent to any extension of time can be found in the clause waiving all defenses by reason of an extension. It is further argued that the defendant Swenson had the right at any time to prevent an extension being given. However, on the question of the extension the evidence is conflicting. The plaintiff testified that Swenson never notified him not to give any further extension of time on the note. Under the rule often an-

Enterprise Planing Mill Co. v. Methodist Episcopal Church.

nounced by this court, where a cause is tried to the court without the intervention of a jury, the findings and judgment of the court are of the same effect as the verdict of a jury.

From an examination of the record, we find no reversible error, and the judgment of the district court is

AFFIRMED

LETTON, J., not sitting.

ENTERPRISE PLANING MILL COMPANY, APPELLANT, v.
METHODIST EPISCOPAL CHURCH OF STERLING ET AL.
APPELLEES.

FILED JUNE 3, 1916. No. 18646.

1. **Appeal in Equity: TRIAL DE NOVO: CONFLICTING EVIDENCE.** On appeal in an equity case, this court tries the case *de novo*; but where the witnesses appear in person before the district court and their testimony is conflicting, the conclusions reached by that court as to the credibility of the testimony are entitled to consideration.
2. **Liens: BURDEN OF PROOF.** The burden of proof is upon one who seeks to establish an equitable lien on real estate to produce facts sufficient to authorize the interposition of a court of equity.

APPEAL from the district court for Johnson county:
JOHN B. RAPER, JUDGE. *Affirmed.*

Boehmer & Boehmer and Hugh La Master, for appellant.

S. P. Davidson, *contra.*

LETTON, J.

This is an action in equity for the purpose of establishing an equitable lien on certain church property in Sterling on the ground that the officers of the church induced plaintiff to refrain from filing a mechanic's lien by promising to pay the debt if such lien was not filed. It is also

Enterprise Planing Mill Co. v. Methodist Episcopal Church.

alleged that by reason of the promise the lien was not filed, the time for filing has expired, defendant refuses to pay the debt, and that unless a lien is allowed plaintiff will lose the amount due. The vice-president of plaintiff corporation testified that a promise and agreement was made by two members of the building committee of the church that if he would not file a lien they would see the debt was paid or furnish security for its payment. That such a promise or agreement was ever made was denied by the men by whom it was said to be made, though the fact that they did not desire a lien filed and had so stated to the officer mentioned was admitted, and that he had requested payment or security. It is shown that the account was left with them in order to consult the third member of the committee, who was absent, and that six days before the time for filing the lien expired it was returned to the plaintiff with the words: "O. K. as to lien, but not as to amount due from L. A. Schlosser, contractor." This was signed "C. E. Zink, Stanley Ostrander, and E. Ross Hitchcock, Committee." The vice-president testifies that, when the paper thus indorsed was returned to Lincoln, he showed it to his partner, who said in effect that this made them safe now, and that this was his idea also, and therefore no lien was filed. The paper was received by plaintiff on the 7th of April, and the time for filing a lien expired on April 13.

The district court, which had the witnesses before it, found for the defendant. It evidently believed the testimony of the members of the committee that they refused to give security as requested and sent back the account marked "O. K. as to lien" to indicate they had no objections to a lien being filed, and that this was done promptly so as to allow the lien to be filed within the time allowed. It is clear from the testimony on behalf of plaintiff that, on account of a mistake being made by its officers as to the force of the memorandum written on the account, it failed to file a lien. No deceit or fraud is shown on the part of the committee. The church paid the contractor

Radcliffe v. Lavery.

more than was due him for labor and material before the account was presented to the committee. The committee then had no power to mortgage or bind the church property.

Plaintiff has not sustained the burden of proof as to the disputed fact. Under such circumstances there is no ground for the interposition of a court of equity. The conclusion reached by the district court was right under the proofs, and its judgment is

AFFIRMED.

MORRISSEY, C. J., and ROSE, J., dissenting.

JAMES W. RADCLIFFE, APPELLANT, v. ED A. LAVERY ET AL.,
APPELLEES.

FILED JUNE 3, 1916. No. 19009.

Action: JOINDER. In order that causes of action may be united, it is essential under section 7658, Rev. St. 1913, that they must affect all the parties to the action.

APPEAL from the district court for Dawson county:
HANSON M. GRIMES, JUDGE. *Affirmed.*

H. D. Rhea, for appellant.

A. J. Shafer, George C. Gillan, George W. Ayres, E. A. Cook and D. H. Moulds, contra.

LETTON, J.

This is an action by a taxpayer of Dawson county to enjoin the board of county commissioners of Dawson county, the board of county supervisors of Phelps county, and the state engineer from carrying out certain contracts made with J. E. Doty and Thomas Gass for the construction of two bridges and approaches across the Platte river, one at Lexington and the other at Overton, upon the

Radcliffe v. Lavery.

grounds that the money on hand in the bridge fund of Dawson county, together with 85 per cent. of the current levy for bridge purposes, was not sufficient to authorize the county commissioners to enter into the contract; that the contract for the Overton bridge was not entered into by the board of county supervisors of Phelps county, but only by three members of the board; that there were no roads leading to the site of the proposed bridges; and several other grounds unnecessary to mention at this time. The prayer was that the defendants be enjoined from carrying out the contracts, and that the county boards be enjoined from expending any money under the same.

The defendants Doty and Gass demurred separately to the petition upon the ground that there was a misjoinder of causes of action. The demurrers were overruled, and they refused to plead further. The county officers of both counties answered, admitting that the contract for the Overton bridge was let to defendant Doty, and for the approaches thereto to defendant Gass, by the county boards acting jointly and with the state engineer; that the contracts for the Lexington bridge and approaches were let by the board of Dawson county and the state engineer to the same parties. The other allegations of the answer allege particularly the amount of money on hand in the several funds, and the legality of the proceedings. The state engineer made a like answer.

At the final hearing the court found the facts generally in favor of the defendants; found also that there was a misjoinder of causes of action. The restraining order which had been issued was dissolved, and the action dismissed at plaintiff's cost. From this judgment he has appealed.

The plaintiff brings the action as a resident and taxpayer of Dawson county. The county board of Phelps county is not a party to, and is not concerned with, the contracts for the Lexington bridge and approaches. They have no common or joint interest in the subject-matter of

Farmers Co-operative Creamery & Supply Co. v. McDonald.

that contract. A cause of action with respect to a contract in which the county board of Phelps county is not a party cannot be joined with another cause in which it is jointly interested with the county board of Dawson county. Section 7658, Rev. St. 1913, requires that, in order that causes of action may be united, they "must affect all the parties to the action."

The demurrers to the petition should have been sustained. At the close of the trial the court practically announced that the ruling upon the demurrers was wrong, and found that there was a misjoinder. The plaintiff making no request to sever, the action was properly dismissed as to Doty and Gass. They were indispensable parties to an action to set aside the contracts. No super-seedeas bond was given. It was stated at the argument that the contracts had been substantially performed. The case is therefore practically a moot one, and we find it unnecessary to consider the other questions presented.

The judgment of the district court is

AFFIRMED.

**FARMERS CO-OPERATIVE CREAMERY & SUPPLY COMPANY,
APPELLEE, v. HENRY S. McDONALD ET AL., APPELLANTS.**

FILED JUNE 3, 1916. No. 19587.

1. **Taxation: BOARD OF EQUALIZATION: INCREASE OF ASSESSMENT.** A county board of equalization, since 1903, may without application or complaint by a taxpayer and upon its own initiative add omitted property to the assessment list of an individual or increase the valuation of his property, but in such case some complaint, charge or specification should be framed by the assessor, or by the board or some member of it, advising the person interested of the proposed change, and the assessment may not be increased until such person or his agent shall be previously notified, if found in the county.

Farmers Co-operative Creamery & Supply Co. v. McDonald.

2. ———: ———: **SESSIONS.** A county board of equalization may hold a session of not more than 20 days for the purpose specified in section 6437, Rev. St. 1913, but it may adjourn from day to day or from time to time within the period fixed by sections 6437, 6442, Rev. St. 1913.
3. ———: ———: **INCREASE OF ASSESSMENT: INJUNCTION.** Where an assessment is increased by the county board of equalization without jurisdiction, a tax based upon the increased valuation is illegal and void, and its collection may be restrained by injunction.

APPEAL from the district court for Douglas county:
WILLIAM A. REDICK, JUDGE. *Affirmed.*

George A. Magney and Ray J. Abbott, for appellants.

R. M. Switzler, contra.

LETTON, J.

Action to enjoin the collection of a portion of a tax for the reason that the board of equalization was without authority to increase the valuation over that returned by the assessor. Judgment for plaintiff. Defendants appeal. One phase of this case has previously been presented to this court, 97 Neb. 510.

After the cause was remanded, an amended petition was filed. Additional allegations were made to the effect that the board of equalization held its first meeting on June 10, and remained in session as such board of equalization by adjournment from day to day until July 1, and that the increase in the assessment was made without sufficient or proper notice and without any complaint being filed; that the assessment made by the assessor consisted of a large number of items separately valued, and that the increase made was in bulk or in gross without reference to the separate items; that the increase was made arbitrarily and without evidence, and the action of the board was taken on the 21st day after its session began, and after the limit fixed by the statute.

The defense is that as to time the matter was decided on the first appeal; that the plaintiff should have appeared

Farmers Co-operative Creamery & Supply Co. v. McDonald.

before the board at the time specified to make its defense; and that plaintiff had an adequate remedy at law by appeal to the district court.

The district court correctly found from the evidence that the assessment was increased on the 21st day of the session of the board, without complaint; that the increase was not made by separate items; that no witnesses were sworn and no testimony taken. It found as a matter of law that the action of the board in increasing the assessment was irregular and void, and enjoined the collection of the portion of the taxes based upon the increase.

Previous to the time the revenue laws of 1903 took effect, the county board was without power to change the assessment of an individual except "on the application of any person considering himself aggrieved or who shall complain that the property of another is assessed too low" (Comp. St. 1901, ch. 77, art. I, sec. 70), and it was uniformly held that the judgment of the assessor as to the valuation of property was presumed to be correct and no authority existed in the board of equalization to increase it except upon a complaint filed and notice given to the interested party. *State v. Dodge County*, 20 Neb. 595; *Dixon County v. Halstead*, 23 Neb. 697; *Grant v. Bartholomew*, 57 Neb. 673; *Bankers Life Ins. Co. v. County Board of Equalization*, 89 Neb. 469.

By the act of 1903 (Laws 1903, ch. 73) the following clauses were added to section 70 of the former law (section 121 of the new act) directing the board to: "(4) Adjust assessments for the county by raising or lowering the assessment of any person as to any or all the items of his assessment in such manner as to secure the listing of property at its actual value and the assessment of property at its taxable value. But in no case shall the assessment of any person be raised by the board until such person, or his agent, shall be previously notified, if such person or his agent be found in the county. (5) Also add to the assessment rolls any taxable property not in-

Farmers Co-operative Creamery & Supply Co. v. McDonald.

cluded therein, assessing the same in the name of the owner thereof as the assessor should have done, but no personal property shall be so added unless the owner thereof is previously notified, if he be found in the county." Sections 122-124 (Laws 1903) were also added. Section 122 provides, in substance, that when the board of equalization shall have reason to believe that any person has not listed all of his property, or that any property has not been fairly valued or assessed, it may call such person before it in person, with books, records and papers, if necessary. By section 123 the board may issue process to compel the attendance of any person to answer questions. By section 124 appeals may be taken from any action of the board of equalization within 20 days after its adjournment, and "the court shall hear the appeal as in equity and without a jury, and determine anew all questions raised before the board which relate to the liability of the property to assessment, or the amount thereof."

Decisions as to the power of the board rendered in controversies arising before the act of 1903 took effect are not controlling with respect to the new provisions. The board of equalization may, as it could under the former statute, act upon the application of any person who may deem himself aggrieved or any person who shall complain that any other is assessed too low, but since 1903 it may also on its own motion raise the assessment of any person after having notified such person or his agent, if he be found in the county. Whether this can be done without notice if the person or his agent be not found in the county, *quære*.

Since the district court upon appeal can only consider "questions raised before the board which relate to the liability of the property to assessments, or the amount thereof," it is evident that, if no taxpayer complains, a complaint or specification of some sort should be framed by the assessor, or by the board or some member of it, advising the person interested of the change proposed to be made

Farmers Co-operative Creamery & Supply Co. v. McDonald.

in his assessment, and due notice be given of the time and place of hearing.

In *Western Union Telegraph Co. v. Douglas County*, 76 Neb. 666, it appeared that the county board caused a notice to be served on plaintiff that its assessment was too low, and requiring it to appear and show cause why it should not be raised. No written complaint was filed. The taxpayer appeared and made no demand for a complaint or objection to its absence. It was held that under such circumstances it had waived the irregularity, the board had jurisdiction, and the remedy was by appeal.

In *Bankers Life Ins. Co. v. County Board of Equalization*, 89 Neb. 469, the assessor added property said to be omitted from the schedule. No notice of the increase was given, but the taxpayer became apprised of the change and appeared before the board of equalization to protest. This was held to confer jurisdiction. It is said in the opinion that the change in the schedule should have been treated as a complaint by the assessor to the board, and notice given, but, the insurance company having appeared, it could not afterwards challenge the jurisdiction. *State Bank v. Seward County*, 95 Neb. 665; *Brown v. Douglas County*, 98 Neb. 299.

While the board may adjust the assessment by raising, if necessary, the valuation of the taxpayer's property, it can only be done after notice has been given to the taxpayer of the proposed change, and a question or issue raised by notice or complaint, however informal, before the board, from which an appeal may be taken. The proceedings need not be conducted with the preciseness or formality of a court, yet the rights of the individual safeguarded by the Constitution require that, even in tax proceedings, due process of law as prescribed in and suitable to such proceedings must be had.

Upon the former appeal of this case the question presented was whether a demurrer to a petition which alleged that the board regularly convened "on June 10, 1913, for the purpose of equalizing the valuation of the personal

Farmers Co-operative Creamery & Supply Co. v. McDonald.

property of the county, and on July 1 following the said board, acting as a board of equalization, raised the assessed valuation of the personal property of the plaintiff," should have been overruled. There was no allegation in the petition, as there is in the amended one now under consideration, that the board convened on the 10th day of June "and remained in session as such board of equalization, by adjournment from day to day, until the 1st day of July." The question considered was whether a board could act at all to increase assessments after 20 days' time, including Sundays, had expired, after June 10. The court was of opinion that it was unnecessary for the board to sit in continuous session; that it could adjourn from day to day or for intervals of several days, so long as the equalization was finished so that the county assessor was able to prepare the abstract of the assessment as equalized, and forward it to the state board of equalization on or before the 10th day of July, as required by section 6442, Rev. St. 1913, and that the mere allegation that the board acted on July 1 failed to show it had lost jurisdiction.

In *Sumner & Co. v. Colfax County*, 14 Neb. 524, under a former statute, it is said: "The power of the board of county commissioners to sit as a board of equalization, rectify the returns of assessors, and change the assessments of property, is limited by the express language of the statute to a term of time not exceeding ten days in any year, commencing on the third Monday of June, and in the nature of things ceases on or before the 10th day of July of each year, when by law it is the duty of the county clerk to make out and transmit to the auditor an abstract of such assessments."

We adhere to our former opinion on this point. It is settled by a number of decisions that, after the board has held sessions for 20 days, it has become *functus officio*, and its powers have ceased, and this fact is now disclosed by the petition and the evidence.

The judgment of the district court is

AFFIRMED.

FAWCETT, J., not sitting.

ROBERT B. HOWELL, APPELLEE, v. BEE PUBLISHING COMPANY
ET AL., APPELLANTS.

FILED JUNE 3, 1916. No. 18882.

Injunction: PUBLICATIONS. The publication of political matter in a newspaper cannot be enjoined merely because it is false or misleading, such relief being forbidden by the following constitutional provisions: "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty; and in all trials for libel, both civil and criminal, the truth when published with good motives, and for justifiable ends, shall be a sufficient defense." Const., art. I, sec. 5.

APPEAL from the district court for Douglas county:
WILLIS G. SEARS, JUDGE. *Reversed and dismissed.*

Rosewater & Cotner and W. J. Connell, for appellants.

Brome & Brome, contra.

ROSE, J.

This is a suit in equity to enjoin the publication of an article relating to the candidacy of plaintiff for the office of governor of Nebraska. At the primary election August 18, 1914, plaintiff aspired to be the republican nominee, but before becoming a candidate he had made and published the following statement:

"I have felt very much complimented by the suggestion of my name for governor, and as much as I should like to serve this state in that honorable capacity, yet I am more strongly inclined to carry on the work of public ownership in this city. As a result I will not be a candidate at the coming primary, but will devote my energies to the water plant and to a campaign for lower electric rates through the development of a public lighting and power plant under the control of the Metropolitan Water District.

"Omaha, June 16, 1914.

R. B. HOWELL."

Afterward plaintiff departed from the purpose thus announced and became an active candidate. August 17, 1914, the day before the primary election, the statement quoted, including the date, "June 16, 1914," was reproduced in the Omaha Evening Bee, under the following head-lines:

**"HOWELL WILL NOT RUN.
"HIS ANNOUNCEMENT EXPLAINING WHY HIS
"FRIENDS SHOULD NOT CAST THEIR
"VOTES FOR HIM."**

Defendants are the publisher and the editor of the Omaha Evening Bee, a daily newspaper. On plaintiff's petition they were restrained by the district court August 17, 1914, as follows:

"It is hereby ordered that the defendants, and each, be and they hereby are restrained and enjoined from printing, publishing, circulating, delivering or mailing any newspaper or other publication to the voters of Nebraska, or to any person or persons within said state, or copy or edition of said newspaper containing any notice or statement of any kind or nature whatsoever, the publication of which states or declares that the plaintiff is not a candidate for the republican nomination for governor of the state of Nebraska, at the primary election to be held August 18, 1914, until the further order of the court."

On appeal defendants take the position that the censorship thus exercised by the trial court is forbidden by the following provisions of the state Constitution:

"Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty; and in all trials for libel, both civil and criminal, the truth when published with good motives, and for justifiable ends, shall be a sufficient defense." Const., art. I, sec. 5.

Was the restraining order properly granted? The answer depends on the meaning of the Constitution. The freedom of the press was not a liberty enumerated in the Magna Charta, but was a subsequent growth of several

centuries. After the printing press became a means of disseminating information and opinions relating to the church and the state, all printed matter was subjected to censorship or supervision. This power was first exercised by the church and afterward by the crown. A printer was required to obtain a license. For publishing seditious opinions such punishment as mutilation, whipping, imprisonment, banishment and death was inflicted. The practice of supervising manuscripts in advance of publication was finally abandoned, but the press was subsequently restricted by vigorous prosecutions for libel and by cruel interpretations of the law on that subject. The doctrine that the truth was no justification for its publication originated in the Star Chamber. Trials for seditious libels became a reproach to the Anglo-Saxon civilization. The use of governmental power in England to limit the activity of the press extended to the American Colonies. In replying to an inquiry by English commissioners concerning the condition of Virginia in 1670, Governor Berkeley said:

"I thank God there are no free schools, nor printing; and I hope we shall not have, these hundred years; for learning has brought disobedience, and heresy, and sects into the world, and printing has divulged them, and libels against the best government. God keep us from both."

The use of the printing press in Virginia was prohibited or restricted until Revolutionary times. In New England official licensors exercised a censorship over the press in the seventeenth century, and in Massachusetts printing was hampered by legal restraints until a few years before the Declaration of Independence. The evils calling for a different attitude toward printing were fresh in the public mind when the first American Constitutions were framed. The first amendment of the Constitution of the United States contains the provision that congress shall make no law abridging the freedom of the press. The powerful agency of the press in the evolution of just

Howell v. Bee Publishing Co.

and efficient government and the indefensible restrictions imposed upon publishers were understood generally when provisions similar to those quoted from the Nebraska Constitution were inserted in the fundamental law of many of the states. In the light of history, some of the leading purposes disclosed by the language of the Constitution cannot be misunderstood. The power to exercise a censorship over political publications, as formerly practiced, is taken away. The exercise of censorship by a court of equity through the writ of injunction is no less objectionable than the exercise of that function by other departments of the government. The truth when published with good motives and for justifiable ends, contrary to the doctrine of the Star Chamber, is a defense in an action for libel, either civil or criminal. It follows that a court cannot use its equity powers to prevent the publication of political matter merely on the ground that it is untruthful or misleading, its truthfulness and its publication for good motives and for justifiable ends being a defense in an action at law.

The power of a court of equity to protect from improper publications the administration of justice and property, contract, personal or other rights guaranteed by either the state or federal Constitution, is not presented or decided.

The restraining order should not have been granted.

REVERSED AND DISMISSED.

HAMER, J., not sitting.

SEDGWICK, J., concurring

The majority of the court declare in the syllabus: "The publication of political matter in a newspaper cannot be enjoined merely because it is false or misleading," because the Constitution provides: "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty; and in all trials for libel, both civil and criminal, the truth when published

with good motives, and for justifiable ends, shall be a sufficient defense." The opinion does not define what is "political matter," and does not say why the fact that it is a defense in an action for libel to prove that the publication was for good motives and for justifiable ends should prevent a court of equity from interfering. I do not recall any more important proposition than the one that is so decided in this opinion. No provision of our Constitution has been more litigated and discussed by the courts than the provision that "every person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty." The discussion started in the courts before our Constitution was adopted, and, in fact, long before the federal Constitution was adopted, it was much discussed in the courts of England. I suppose that it is the intention of the opinion in this case to hold that publication in a newspaper will not be enjoined under any circumstances because every person may freely speak, write and publish on all subjects. Several hundred years ago this was announced as the law in England, but the English courts have entirely abandoned the doctrine, and at the present time the courts of England deal with injury to personality by writing and publishing in the same manner that they deal with any other torts. There has been a most remarkable growth in this country in the same direction. In *Francis v. Flinn*, 118 U. S. 385, the supreme court of the United States announced the dictum that "in the eyes of the law" damages are an adequate remedy for all publications; but a very few years later in the famous case of *Gompers v. Buck Stove & Range Co.*, 221 U. S. 418, that court sustained an injunction restraining the defendants "from printing, issuing, publishing, or distributing" certain matters which were alleged to be injurious to the plaintiffs. This shows a remarkable growth in the direction of requiring courts of equity to restrain wrongdoing when there is no other remedy to prevent it, and this does not seem to me to be a violation of the Constitution. Those who

Miller v. Swift & Co.

publish are "responsible for the abuse of that liberty," and it is the abuse of the liberty that is enjoined, and not the liberty itself.

There are other reasons given in the brief for reversing the judgment in this case which seem to call for reversal. I am not satisfied with the discussion in the majority opinion, nor with the statement of the law in the syllabus.

GEORGE MILLER, APPELLEE, v. SWIFT & COMPANY, APPELLANT.

FILED JUNE 3, 1916. No. 18854.

Appeal from Justice Court: TRIAL DE NOVO. In the trial in the district court to a jury of an action appealed from justice court, it is error to admit in evidence, over the objection of the appellant, a transcript from the justice containing detailed findings of fact and the judgment of such justice.

APPEAL from the district court for Douglas county: JAMES P. ENGLISH, JUDGE. *Reversed.*

Gurley, Woodrough & Fitch, for appellant.

Jamieson & O'Sullivan, contra.

FAWCETT, J.

From a judgment for plaintiff, in justice court in Douglas county, for personal injuries, defendant appealed to the district court, where plaintiff was again successful, and defendant has appealed to this court.

Plaintiff alleges that he was told by his foreman to carry two panes of glass, each 40 by 46 inches in size, from the first floor to the second. In order to do so he was required to ascend a flight of stairs which the evidence shows was about four feet wide and without any turn. He carried the first pane up safely, but, in carrying the second pane, when he reached the head of the stairs and turned

to go east, the glass broke. One of the broken pieces struck him on the hand and made a bad cut which resulted in a loss of 27 days' time and an expenditure of \$11 for surgical treatment, and caused him more or less suffering. In entering the judgment, the justice made findings of fact on which he based the judgment. On the trial in the district court plaintiff testified in his own behalf, and then offered the entire transcript from the justice court. Over defendant's objection the transcript was received in evidence. The transcript contained the following findings by the justice:

"I find that plaintiff, while in the employ of defendant on Sept. 8, 1913, was ordered, by the foreman in charge of him to carry a pane of glass from the first floor to the second floor; that he remonstrated, but nevertheless proceeded to carry said pane of glass from first floor to second floor; that said pane of glass was defective, which was known both to the said foreman and this plaintiff; that as he reached the top step of said stairs and turned east the said pane of glass broke and cut plaintiff's hand, thereby necessitating his being out of work for a period of 27 days and causing him mental pain and suffering; that said injury was caused through carelessness and negligence; that a reasonable compensation for the injury so received is \$125. Wherefore I give judgment for the plaintiff for \$125 and costs of suit taxed at \$3.40."

The reason given by the trial court for admitting the transcript was that "it is part of the files in the case." So were the allegations in plaintiff's petition, but no one would contend that plaintiff could introduce them as evidence of his right to recover. Counsel say the transcript was material for the purpose of showing upon what issues the case was tried before the justice. The transcript may be used for that purpose, but it must be so used with the court. The jury has nothing to do with determining the issues upon which the case is presented to them. The introduction of the findings and judgment of the justice as evidence was peculiarly prejudicial in this case, where

Roden v. Williams.

plaintiff was relying upon his own testimony, which upon the most material points was in conflict with the testimony of the foreman, introduced by defendant. It is argued that plaintiff has recovered in two courts and this court ought not to set aside the recovery. We recognize the force of this contention, and under ordinary circumstances it would prevail, but in the case at bar the error is too plain to be ignored.

REVERSED AND REMANDED.

THOMAS RODEN, APPELLEE, v. PARIS A. WILLIAMS, APPELLANT.

FILED JUNE 3, 1916. No. 18868.

1. **Contracts: PAROL EVIDENCE.** "Where a contract of sale has been consummated by writing, the presumption is that the writing contains the whole contract, and, in the absence of fraud, mistake or ambiguity of expression in the contract itself, parol evidence is inadmissible to change or vary its terms." *Apking v. Hoefer*, 74 Neb. 325.
2. **Vendor and Purchaser: OUTHouses.** Buildings, such as corn cribs, cattle sheds, hog sheds, and other customary outhouses, situated upon a farm, are of the general class which a prospective buyer inspecting the farm would have a right to assume are part of the freehold. They are not such as to put him upon inquiry in reference thereto, even though he may then know that the farm is occupied by a tenant.
3. ———: **REMOVAL OF OUTHouses: LIABILITY OF VENDOR.** And where the owner of such a farm sells the same and enters into a written contract of sale thereof, without reserving such buildings, and such contract is finally consummated by the payment to him by the purchaser of the full agreed consideration for such farm, the seller will be liable to the purchaser for the value of such improvements, if owned by the tenant and removed by him without the consent of such purchaser.

Roden v. Williams.

4. **Appeal: CONFLICTING EVIDENCE.** "The verdict of a jury will not be set aside for want of evidence to support it, if there is a substantial conflict of evidence upon the issue presented." *First Nat. Bank v. Hedgecock*, 87 Neb. 220.

APPEAL from the district court for Franklin county:
HARRY S. DUNGAN, JUDGE. *Affirmed.*

W. C. Dorsey, for appellant.

George Losey and J. C. McReynolds, contra.

FAWCETT, J.,

This action was brought in the district court for Franklin county, to recover damages which plaintiff claims to have sustained by reason of a breach of certain conditions in a contract, entered into between plaintiff and defendant, for the sale by the latter to the former of a quarter section of land. Plaintiff recovered, and defendant appeals.

The evidence fairly establishes the following facts: In the fall of 1912, defendant listed the land for sale with one Myers, a real estate agent. Myers negotiated a sale of the land to plaintiff for \$9,000, and prepared a contract of sale for execution by the parties. The contract provided that the consideration should be paid, \$300 cash, \$1,000 on or before December 16, and the balance of \$7,700 on or before March 1, 1913, "less \$2,600 mortgage at 5 per cent. interest," and that plaintiff was to take the property subject to the taxes for 1912 and subsequent taxes. The contract was signed by defendant and left with his agent, Myers, for execution by plaintiff. A few hours later plaintiff called at the office of Myers and the contract was submitted to him. He objected to assuming the taxes for 1912 and refused to sign unless there were inserted the words "Taxes of 1912 paid." Myers said he would make such change, with the understanding that the deal would not go through unless defendant agreed to it. Plaintiff agreed to that arrangement and Myers then changed the contract by in-

Roden v. Williams.

serting those words. Thereupon plaintiff signed the contract and paid Myers the \$300 cash payment. Some two or three hours later in the day Myers met defendant and told him what had been done. He testifies that he told defendant that plaintiff refused to buy the place unless the taxes were paid by defendant; that defendant "looked it over and said it was all right, that he wouldn't let the taxes stop the sale, and I asked him then if it was a go, and he said, 'Yes.' Q. If I understand you, Mr. Myers, Mr. Williams agreed finally to the contract as it was amended? A. Yes, sir." Defendant admits having stated to Myers, "Well I don't know as I would let the taxes spoil the contract," but says that afterwards he considered the matter and, as he "had been on a deal with a man for the farm for \$10,000," and plaintiff had "jewed us down" \$600, he made up his mind that he would not stand for the taxes at all. He did, however, accept the \$300 which plaintiff had paid. The above facts present the first question to be determined, viz.: Did defendant by what he said to Myers after Myers had changed the contract, and by the acceptance of the \$300, ratify and confirm the contract which he had signed, as changed by Myers? We agree with the jury that he did. On December 16 the parties met for the purpose of adjusting the second payment of \$1,000 provided by the contract to be paid on that date. This appears to have been the first time plaintiff and defendant had met. Defendant then insisted that plaintiff must pay the taxes for 1912 and the interest on the mortgage from the last interest payment, viz., June, 1912. The evidence is in conflict as to whether or not plaintiff agreed to that demand. It would sustain a verdict either way. The verdict for plaintiff must therefore stand.

A further controversy arose between the parties, subsequent to the execution of the written contract, with regard to certain improvements which defendant's tenant, then in possession of the farm, had placed upon it. The improvements consisted of a granary, inside of and boarded up to the corner; a "big" shed that was built up a

Roden v. Williams.

gainst the barn; a cattle shed, 16 by 14, which had been built in the cattle yard; a hog shed and a privy. The right of defendant, or his tenant, to remove these improvements must be determined by the terms of the written contract. In that contract no reversion is made by defendant of the improvements in controversy. The improvements were of a class which any one inspecting the farm would have a right to assume were a part of the freehold. They were not such as to put a prospective purchaser upon inquiry in reference thereto, even though he knew the farm was then occupied by a tenant. They were of such a class as to impose upon the seller the duty of advising the prospective purchaser of the fact that they belonged to the tenant and not to the freehold. It is true, the parties had some conversation in relation to the improvements at their first meeting on December 16, which was a month after the execution of the contract. Nothing then said could release defendant from his liability for the value of the improvements if removed by him or his tenant, unless the plaintiff then agreed to release him from such liability. The evidence upon this point is in conflict. The jury found for plaintiff upon sufficient evidence to sustain their finding, and it is conclusive.

The contract required the final payment to be made on or before March 1, 1913. Defendant deposited with the bank at Riverton his copy of the contract, and also a deed to the land, to be held until the final payment was made to the bank for him, when the deed was to be delivered. It is urged by defendant that, when plaintiff made the final payment on February 28, he had been told by defendant that he (defendant) would not make him a deed to the land unless he paid the 1912 taxes, and the interest on the mortgage from the last interest payment date in June, 1912; that he knew when he had made such payment that the improvements in controversy had been removed by the tenant. In support of this contention defendant says that plaintiff made the final payment with full knowledge of the facts and without duress or fraud;

Roden v. Williams.

that he thereby acceded to the demands of the defendant, and, whether such demands were well founded or not, the final payment made by him under such circumstances was a voluntary payment and cannot be recovered back, wholly or in part. We are unable to concur in defendant's view of the law applicable to the facts shown by the record. This court has settled the rule applicable to such facts. "Where a contract of sale has been consummated by writing, the presumption is that the writing contains the whole contract, and, in the absence of fraud, mistake or ambiguity of expression in the contract itself, parol evidence is inadmissible to change or vary its terms." *Apking v. Hoefer*, 74 Neb. 325. In the opinion (p. 328) we said: "Even if the defendant agreed orally, after the contract was executed, that the plaintiffs might have a few days after July 10 to meet the payment maturing on that date, it was a naked promise, without consideration, and could not be enforced. It follows therefore that the court erred in the admission of oral evidence to vary the terms of the written contract. It is clearly apparent from the written contract that time was of the essence of it, and that the failure of the plaintiffs to meet the payment maturing on the 10th day of July, 1902, gave defendant the option to forfeit the contract and declare it at an end." That such a contract as the one involved here manifests an intention to make time of the essence of the contract is also held in *Cadwell v. Smith*, 83 Neb. 567. When plaintiff appeared at the bank on February 28 to make his final payment and obtain his deed, he had only one more day remaining in which to comply with the terms of his contract as to the making of such final payment. Had he failed to make his final payment on that day or the next, defendant, by the terms of the contract, would have been released from all liability thereunder, and plaintiff would have lost his bargain, and would, probably, have had difficulty in obtaining a return of the \$1,300 which he had paid thereon.

Hiatt v. Tomlinson.

All of the points in controversy, above referred to, were properly submitted to the jury by the instructions of the court. The verdict returned under those instructions has sufficient evidence to support it. Finding no reversible error in the record, the judgment of the district court is

AFFIRMED.

HAMER, J., not sitting.

M. T. HIATT ET AL., APPELLANTS, v. HENRY W. TOMLINSON ET AL., APPELLEES.

FILED JUNE 3, 1916. No. 19339.

County Officers: REMOVAL FROM OFFICE. Actions under section 5698, Rev. St. 1913, to remove county officers from office are highly penal in their nature, and the evidence must be clear and satisfactory. The language, "for habitual or wilful neglect of duty" and "for wilful maladministration in office," involves more than oversight, carelessness or mistake. To justify removal of a county officer on such grounds, it must be clearly shown that the action of such official was prompted by some evil intent or legal malice, or at least without sufficient grounds to believe that he was properly performing his duty.

APPEAL from the district court for Holt county:
ROBERT R. DICKSON, JUDGE. *Affirmed, with directions.*

H. M. Uttley, for appellants.

J. A. Donohoe and J. J. Harrington, contra.

FAWCETT, J.

This action was instituted by plaintiffs, as taxpayers and citizens of Holt county, under the first and sixth subdivisions of section 5698, Rev. St. 1913, to remove defendants from their offices as supervisors of such county. From a judgment dismissing the action at their costs, plaintiffs appeal.

Hlatt v. Tomlinson.

The petition contains two paragraphs. The first simply alleges that plaintiffs are taxpayers and citizens of Holt county. The second is divided into 16 subdivisions. The sixteenth subdivision has been abandoned by plaintiffs in their brief. The first, second, fourth, fifth, sixth, seventh, eighth, tenth, twelfth and fifteenth were stricken by the court. In the motion for a new trial plaintiffs do not assign any error of the court in striking out these subdivisions, and for that reason defendants had not given them any attention in their brief, although plaintiffs argue them. Defendants were justified in paying no attention to those subdivisions in this court. Plaintiffs, by failure to assign error as to them in their motion for a new trial, waived error, if any, in relation thereto. This leaves subdivisions 3, 9, 11, 13 and 14 to be considered.

The third subdivision complains of the defendants for allowing pay for clerks in the offices of the county attorney, sheriff, and county assessor, for the reason that such action was not allowed by law; that the board had not, prior to paying the salaries, found as a matter of fact that any clerks were necessary, and that no clerks were necessary in any of the said offices. The record shows that as to each of the three officers named the matter was taken up in advance by them with the board or with members of the board. In the case of the county attorney and sheriff the application for help was not made in writing; in the case of the assessor it was, but the action of the board was not specific. Here is the record: "To the Hon. Board of Supervisors. Gentlemen: I do hereby make application for sufficient help in the office of county assessor for the year 1914. T. J. Coyne, county assessor. On motion petition was granted." We think this point is settled adversely to plaintiffs' contention by *Lancaster County v. Green*, 54 Neb. 98; *Berryman v. Schaland*, 85 Neb. 281; *Gage County v. Wright*, 86 Neb. 436; and *Embersen v. Adams County*, 93 Neb. 823.

Subdivision 9 alleges that the defendants, during the years 1913 and 1914, allowed claims, and drew warrants

Hiatt v. Tomlinson.

in payment thereof, for the building of bridges and culverts and for material furnished therefor, when the persons presenting such claims had never been employed by the board to build such bridges or furnish material therefor, and that this allegation applies to practically every claim allowed by the board and paid therefor by warrant during the two years named.

By subdivision 11 it is complained that the defendants, during the two years named, unlawfully failed and neglected to comply with chapter 111, Laws 1911, being section 2956, Rev. St. 1913. In reference to the letting of contracts for bridges, the cost of which exceeded the sum of \$500, and failed to require bills for labor performed and material furnished for such bridges to be made out and filed in the manner required by statute, and failed and neglected to procure and keep records of bridges built.

Subdivision 13 complains that defendants, during the year 1914, failed, neglected and refused to make any contracts for the purchase of supplies, such as books, blanks, etc., for the county, as required by sections 1089, 1090, Rev. St. 1913.

Subdivision 14 complains that defendants did during 1914 unlawfully pay out a large amount of county money, levied and collected for the purpose of the expenses of Holt county for the year 1914, for bills filed, supplies furnished, and work and labor done during the year 1913, and prior thereto, without having included such claims or bills in the estimate of expenses made by them as required by law at the first meeting in January, 1914, among which were bills to the Western Bridge & Construction Company, amounting to \$18,000, or more; bills to the Klopp-Bartlett Printing Company, amounting to \$1,000, or more; bills to George A. Miles, to an amount to plaintiffs unknown; and to others whose names were unknown to plaintiffs; that all of these acts were wholly, entirely, and directly in violation of the statutes. The large amount paid to the Western Bridge & Con-

Hiatt v. Tomlinson.

struction Company, referred to in subdivision 14, was for bridge work rendered necessary by the washing out of some bridges and damage to others, which stopped travel in some cases, and rendered it dangerous in others. The evidence we think fairly shows that the commissioners in this instance advised with the lawyers at O'Neill and also with the district judge, all of whom it is claimed, and tacitly admitted by plaintiffs, advised the commissioners to go ahead and have the work done. In none of the cases is there pointed out any fraud or fraudulent intent on the part of the commissioners. It is not claimed that in the making of any of these purchases, or in having any of the work done, the commissioners entered into fraudulent collusion with any one; nor is there evidence to show that the commissioners have ever received any money or thing of value to which they were not entitled.

Some contention is made that in certain instances *per diem* was allowed to commissioners for special work done on committees, or where certain work, such as supervision of bridge construction and road work, and like matters, was delegated by the board to some individual member of the board, and that the board met with greater frequency than was necessary. But we have been unable to find in the record evidence of fraud or evidence to show that the defendants, representing the county, ever paid out any of the county's money for which the county did not receive a fair equivalent.

That the members of the board had an erroneous idea as to the manner in which their duties should be performed, and that they did many things contrary to the method prescribed by statutes, is established by the record. Many of the things they did and some of the contracts they entered into would have been promptly enjoined by the courts if application had been made by the plaintiffs, or any other taxpayers, for such relief; but no such action was taken.

Section 5698, Rev. St. 1913, upon which the case at bar is based, reads thus: "All county officers, including justices of the peace, may be charged, tried and removed from office for official misdemeanors in the manner and for the causes following: First, for habitual or wilful neglect of duty. * * * Sixth, for wilful maladministration in office."

Section 1a, ch. 71, Comp. St. 1911, reads as follows: "Any county attorney or prosecuting officer, sheriff, police judge, mayor, police officer, or police commissioner or other officer who shall wilfully fail, neglect or refuse to enforce any law which it is made his duty to enforce shall thereby forfeit his office and may be removed therefrom."

To our mind, these two sections of the statute are equally drastic in their provisions, are each highly penal in their nature, and a construction of one would apply to the other. The latter of the two sections was under consideration in *State v. Donahue*, 91 Neb. 311. In the sixth paragraph of the syllabus we held: "Prosecutions under this statute are highly penal in their nature, and the evidence must be clear and satisfactory. To wilfully fail, neglect or refuse to enforce a law involves more than oversight or carelessness or voluntary neglect. It must be prompted by some evil intent, or legal malice, or at least be without sufficient grounds to believe that he is performing his duty." This holding is well sustained by authority. "Doing or omitting to do a thing 'knowingly and wilfully' implies not only a knowledge of the thing, but a determination with an evil intent to do it or to omit doing it." *Felton v. United States*, 96 U. S. 699.

"What is the meaning of 'wilful misconduct' as that phrase is here employed? Manifestly it is not applicable to every case of misconduct, nor to every mistake, or every departure from the strict letter of the law defining the officer's duties, but only to wilful wrongs or omissions on his part. The word 'wilful,' like most other words in our language, is of somewhat varied signification according

to its context and the nature of the subject under discussion or treatment. Frequently it is used as nearly or quite synonymous with 'voluntary' or 'intentional,' and evidently this is the interpretation given it by the trial court in the case before us. But when employed in statutes, especially in statutes of a penal character, it is held with but few exceptions to imply an evil or corrupt motive or intent." *State v. Meek*, 148 Ia. 671.

"The word 'wilfully' in the provision of the Penal Code (section 639), declaring that 'any person who wilfully or maliciously displaces, removes, injures or destroys * * * a pipe or main for conducting water or gas * * * is punishable by imprisonment,' means not simply a voluntary and intentional act, which is in fact wrongful, but one done with a wrongful purpose, with a design to injure another, or from mere wantonness or lawlessness." *Wass v. Stephens*, 128 N. Y. 123.

"For the plaintiff it is contended that the term 'wilfully,' as here used, signifies no more than *voluntarily* or *purposefully*—thus distinguishing the act of obstructing made penal, from one which may be said to have been *accidental*, which last alone it was the design of the statute not to punish. The word 'wilfully,' as used to denote the intent with which an act is done, is undoubtedly susceptible of different shades of meaning or degrees of intensity according to the context and evident purpose of the writer. It is sometimes so modified and reduced as to mean little more than plain *intentionally*, or *designedly*. Such is not, however, its ordinary signification when used in criminal law and penal statutes. It is there most frequently understood, not in so mild a sense, but as conveying the idea of legal malice in greater or less degree, that is, as implying an evil intent without justifiable excuse." *State v. Preston*, 34 Wis. 675, 683.

"The word 'wilfully,' in the ordinary sense in which it is used in statutes, means not merely 'voluntarily,' but with a bad purpose." *Commonwealth v. Kneeland*, 20 Pick. (Mass.) 206, 220.

Hiatt v. Tomlinson.

"We are of opinion that under the statute an official act done or omitted cannot be said to have been wilful unless the officer knew or believed that it was his official duty to do or omit the act, and with such knowledge or belief obstinately, perversely, and with intent to do wrong acted or failed to act." *State v. Alcorn*, 78 Tex. 387.

In *State v. Scates*, 43 Kan. 330, 335, an action to remove an officer, the decision concludes: "As the majority of the court do not find that any of the acts complained of were done by Scates corruptly, or with the intent to defraud the taxpayers of Seward county, judgment will be rendered in his favor and against the plaintiff."

"When proceedings under section 7459 of the Revised Statutes are brought to remove a county officer, and the court finds that such officer acted honestly in making such charges against his county, and honestly believed at the time he presented his claim for allowance, and when he collected the same, that such charges were legal, it is error to remove him from office, and enter judgment against him for the penalty provided by said section." *Ponting v. Isaman*, 7 Idaho, 581.

In *People v. Therrien*, 80 Mich. 187, 195, it is said: "The right to hold this office is just as sacred in the eyes of the law to Metevier as the right to hold the property he has earned. It is a property right, and one of which he can only be divested by a strict conformity to the statute. * * * The people of Mackinac county have rights also, as well as the accused. They have the right, under the Constitution, to elect their county officers, and to have such officers serve out the terms for which they were elected. It was not contemplated by the Constitution that such officers should be removed but for grave reasons."

The holding of the trial court is in harmony with the law as announced in the above cases, and is also well within our holding in *State v. Hastings*, 37 Neb. 96.

In reaching the conclusion that the judgment of the district court should be affirmed, we have not been able to shut our eyes to the fact that the defendants, in trans-

Hiatt v. Tomlinson.

acting the business of the county, have so frequently acted contrary to the method of procedure pointed out by statute that plaintiffs are not entirely without justification in instituting the present action. We are impressed with the conviction that they also have acted in good faith.

In such a case, who should bear the costs of this litigation?

We think such costs should be taxed to the parties whose carelessness in the discharge of public duties caused the making of such costs. Such a course will prevent such carelessness on the part of the defendants in the future, and will also be a salutary admonition to the commissioners of other counties in the state to discharge their duties in accordance with the requirements of statutes enacted for their guidance.

The judgment of the district court is therefore affirmed in so far as it dismisses the action, but reversed in so far as it taxes the costs to the plaintiff, and the cause is remanded to the district court, with directions to tax all costs in the action to the defendants; defendants to also pay the costs in this court.

JUDGMENT ACCORDINGLY.

LETTON, J., not sitting

ROSE, J., dissenting.

I dissent from the decision of the majority on three fundamental grounds:

1. This is a civil action, and a preponderance of the evidence is sufficient to establish any issue in such a case. *Patrick v. Leach*, 8 Neb. 530; *Search v. Miller*, 9 Neb. 26; *Kopplekom v. Huffman*, 12 Neb. 95; *Altschuler v. Algaza*, 16 Neb. 631; *Dunbar v. Briggs*, 18 Neb. 94; *Stevens v. Carson*, 30 Neb. 544; *First Nat Bank v. Goodman*, 55 Neb. 409; *Western Mattress Co. v. Potter*, 1 Neb. (Unof.) 627; *Schmuck v. Hill*, 2 Neb. (Unof.) 79; *Link v. Campbell*, 72 Neb. 307; *Kramer v. Weigand*, 91 Neb. 47. To make "clear and satisfactory" evidence essential to a finding against

Uttley v. Sievers.

defendants in a civil suit to remove county officers for violating statutes is to confuse terms, and to require more than a preponderance of the evidence.

2. Statutes authorizing the removal of county officers for violating official duties are not "highly penal," but are remedial in their nature, and should be liberally construed to suppress mischief and advance the remedy. *Buckmaster v. McElroy*, 20 Neb. 557, approving Sedgwick, Construction of Statutory and Constitutional Law (2d ed.) p. 309; 2 Wharton, Criminal Law (10th ed.) sec. 1582.

3. The intentional violation of an official duty is sufficient to justify the removal of an officer, under a statute so declaring; evil intent or malice not being essential. *State v. Sheldon*, 10 Neb. 452; *Highway Commissioners v. Ely*, 54 Mich. 173; *People v. Herlihy*, 72 N. Y. Supp. 389; *Louisville & Jeffersonville Ferry Co. v. Commonwealth*, 104 Ky. 726; *People v. Brooks*, 1 Denio (N. Y.) 457; *Commonwealth v. Green*, 1 Ashm. (Pa.) 289; *Tracy v. Commonwealth*, 76 S. W. (Ky.) 184; *People v. Draper*, 63 Hun (N. Y.) 389.

Adhering to these well-established principles, founded as they are in justice and reason, I am compelled to dissent from the opinion of the majority.

H. M. UTTLEY ET AL., APPELLANTS, v. T. D. SIEVERS ET AL.,
APPELLEES.

FILED JUNE 3, 1916. No. 19371.

1. **Statutes: MODIFICATION: CONSTITUTIONAL PROVISIONS.** "Changes or modifications of existing statutes as an incidental result of adopting a new law covering the whole subject to which it relates are not forbidden by section 11, art. III of the Constitution." *De France v. Harmer*, 66 Neb. 14.
2. **Counties: CLAIMS: VERIFICATION.** Section 35, ch. 19, Laws 1866, examined in connection with section 37 of the act of March 1, 1879

Uttley v. Slevers.

(Laws 1879, pp. 353, 366), and *held*, that the former act was superseded and repealed by the later act; that by such repeal section 2461, Rev. St. 1913, is no longer in force, and that section 965, Rev. St. 1913, prescribes the verification required to be attached to all claims filed against a county.

APPEAL from the district court for Holt county: ROBERT R. DICKSON, JUDGE. *Affirmed*.

H. M. Uttley, for appellants.

J. A. Donohoe, *contra*.

FAWCETT, J.

Plaintiffs instituted this action in justice court in Holt county, under the provisions of section 2461, Rev. St. 1913, to recover, for the state of Nebraska, the sum of \$50, which it is alleged defendants should forfeit to the state for having, as the county board of supervisors, allowed the claims of two of its members for *per diem* and disbursements without requiring from them the oath prescribed by such section. From a judgment in favor of the defendants, plaintiffs appealed to the district court, where a like judgment was entered, and plaintiffs have brought the case to this court for review.

The case turns on the question as to whether or not section 2461 or section 965, Rev. St. 1913, governs. The case was submitted on a stipulation of facts in which it is admitted by the parties that the claims appearing in the record are true copies of the original claims as allowed; that the affidavit mentioned in section 2461 was not made in connection with such claims; that such affidavit has never been required or made in connection with any or like claims in Holt county since the county was organized, and that claims similar to the ones in controversy have been filed and allowed by every county board of that county since its organization; that the form of claim in controversy "is in the same form and the verification is the same as that used in every other county in the state of Nebraska."

Uttley v. Slevers.

It will be seen from this stipulation that the justness of the claims in controversy is not assailed, nor the honesty of the defendants as commissioners called in question; that the action is based solely upon the ground that the defendants, as commissioners, allowed the claims upon a verification prescribed by section 965, *supra*, found in the act entitled "Counties and County Government," instead of section 2461 appearing in the act entitled "Fees and Salaries." Defendants contend that section 2461 was repealed by an independent act of the legislature, approved March 1, 1879, which became effective September 1, 1879. Section 2461, upon which the action is based, was adopted in 1866, and appears as section 35, ch. 19, Laws of that year. This chapter will also be found in Rev. St. 1866, p. 157; section 35 being found on page 172. This section has been carried in the statutes of the state down to and including Revised Statutes 1913, in which it appears as section 2461. The act of March 1, 1879, is entitled "An act concerning counties and county officers." It is a comprehensive act of 154 sections. It proceeds in great detail to define the powers and duties of county officers of various kinds, the filing of claims against the county, the issuance of warrants, etc., and by section 37 provides: "Before any claim against a county is audited and allowed, the claimant or his agent shall verify the same by his affidavit, stating that the several items therein mentioned are just and true, and the services charged therein, or articles furnished, as the case may be, were rendered or furnished as therein charged, and that the amount claimed is due and unpaid after allowing all just credits." Section 153 expressly repeals certain enumerated chapters and sections of other chapters, and concludes: "And all acts and parts of acts inconsistent with the provisions of this act are hereby repealed." By the concluding section it is provided that the act should take effect and be in force from and after September 1, 1879. Section 37 has never been repealed or amended, and now appears as section 965, Rev. St. 1913. This was an in-

Uttley v. Sievers.

dependent act, complete within itself, and it is now claimed that as it is squarely in conflict with section 35, ch. 19, Laws 1866, it repeals such former act by implication, and that by reason of such repeal section 2461, Rev. St. 1913, is obsolete and of no force and effect.

Plaintiffs cite and rely upon the authorities that the repeal of a statute by implication is not favored, and it is only where two statutes relating to the same subject are so repugnant to each other that both cannot be enforced that the last one enacted will supersede the former and repeal it by implication. There is no doubt as to the soundness of that rule. It has been frequently applied by this court. But there is another rule equally well established in this court and clearly announced in *De France v. Harmer*, 66 Neb. 14, viz.: "Changes or modifications of existing statutes as an incidental result of adopting a new law covering the whole subject to which it relates are not forbidden by section 11, art. III of the Constitution." This holding is reaffirmed in *Wilkinson v. Lord*, 85 Neb. 136. See, also, *Brome v. Cumming County*, 31 Neb. 362, and *State v. Benton*, 33 Neb. 823.

Does the fact that section 2461 appears in the act entitled "Fees and Salaries," while section 965 appears in the act entitled "Counties and County Government." in any manner change the rule? We think not. As said by counsel for plaintiffs, at the time section 2461 was adopted in 1866, and until the enactment of 1879, there was no provision in the statute requiring general claims for work and labor, material furnished, etc., to have any affidavit or proof attached thereto; the only requirement of a verification of a claim being the one upon which plaintiffs now rely. There were many other questions relating to counties and county officers which during those years were indefinite and incomplete. This condition of affairs doubtless led the legislature to pass the act of 1879. In 1866 there were comparatively few counties in the state. In 1879 the number had greatly multiplied. Conditions in the state had greatly changed. The sub-

Uttley v. Slevers.

ject of counties and county officers had become an important one, and, in order to secure a comprehensive and clear definition of the rights of counties and the powers and duties of county officers, the legislature went fully into the subject and passed a new, independent and comprehensive act settling all those matters. Section 2461, as it then existed, required only a verification of claims presented by officers whose salary was in the nature of a *per diem*, and it only required a verification as to the number of days in which such officer was necessarily engaged in the duties of his office. He was not required by that section to make oath to any of his disbursements made in the discharge of his duties, such as mileage, or other expenditures which he might properly make in the discharge of his duties. The legislature by section 37 of the new act covered the whole ground, and he is now required, before his claim against the county can be audited, to make the same verification as that required of all other persons. He must verify his claim by affidavit, stating that the several items therein mentioned are just and true, "and the services charged therein, or articles furnished, as the case may be, were rendered or furnished as therein charged, and that the amount claimed is due and unpaid after allowing all just credits." This is a comprehensive act which not only adds new requirements in the verification, but also covers the requirements which had previously existed under the act of 1866.

We therefore hold that the act of 1879 superseded and repealed section 35, ch. 19, Laws 1866, and that section 2461, Rev. St. 1913, from and after the passage of the act of 1879, was without force or effect, and should have been dropped from the statute, and that the case at bar is governed by section 965, Rev. St. 1913. In thus holding, we are harmonizing the law with the construction that has been placed upon it in every county in the state, and are placing the verification of claims against counties in substantial accord with the verification of claims against the state, as provided by chapter 65, Laws 1895, which

Nemaha Valley Drainage District v. Nemaha County.

verification is the one now in use as to claims of all kinds against the state, for the payment of which warrants are drawn by the auditor on the state treasurer. To hold otherwise would be to compel the counties to require two vouchers from each official of the county whose salary is in the nature of a *per diem*; one for his salary, and the other for his disbursements.

The judgment of the district court is right, and it is

AFFIRMED.

ROSE, J., dissents.

LETTON, J., not sitting.

NEMAHA VALLEY DRAINAGE DISTRICT, APPELLEE, v.
NEMAHA COUNTY, APPELLANT.

FILED JUNE 3, 1916. No. 19554.

1. **Drainage Districts: DEPOSITS: INTEREST.** Interest received from depository banks, by a county treasurer, upon funds in his custody as *ex officio* treasurer of a drainage district, is the money of such district and should be credited by the treasurer to its account and not to the general fund of the county.
2. ———: **FEES.** Under the provision of section 1858, Rev. St. 1913, requiring a drainage district to pay the fees of all court and county officers who may by virtue of the act render service to said district, the county in which the drainage district, or the chief portion thereof, is situated, is entitled to retain, as a part of its general fund, the fees fixed by statute, for all taxes and special assessments collected by the county treasurer of such county in his official capacity as such treasurer and by him paid into such general fund.

APPEAL from the district court for Nemaha county:
JOHN B. RAPEL, JUDGE. *Affirmed.*

Nemaha Valley Drainage District v. Nemaha County.

Neal & Armstrong, for appellant.

Kelligar & Ferneau, contra.

FAWCETT, J.

Plaintiff, which will be called the drainage district, is a public corporation organized under the provisions of sections 1797-1865, Rev. St. 1913. Defendant, which will be called the county, is also a public corporation and one of the political subdivisions of the state. The petition sets out two causes of action. The issues tendered thereby present questions of law only, the facts having been stipulated. The first presents the question of the liability of the county to account for interest collected by the county treasurer, and credited to the general fund of the county, on the funds of the district, deposited by the county treasurer, together with other funds in his hands, in the several depository banks of the county, under the provisions of the statute requiring the deposit of all funds collected by him. The second presents the question of the liability of the county for collection fees charged by the county treasurer, and credited to the general fund of the county, on the taxes levied by the district and certified to the county clerk of defendant county and extended by him on the tax rolls of the county, and thereafter certified by him and delivered to the county treasurer of defendant county for collection. Plaintiff recovered on the first cause of action, and defendant recovered on the second. Each party appeals.

We will first consider defendant's appeal from the judgment on the first cause of action. Section 6660, Rev. St. 1913, provides that the county treasurer shall deposit "the amount of moneys in his hands collected and held by him as such county treasurer." In the next section, providing for the manner in which the money shall be kept, it is termed "public funds on deposit," "public moneys," and "public moneys of the county," and it was provided that "all interest on such moneys be credited by the

Nemaha Valley Drainage District v. Nemaha County.

county treasurer directly to the account of the general fund of the county." In the next section the fund is spoken of as "moneys of the county." Section 6663, Rev. St. 1913, prohibits the making of profit, directly or indirectly, out of any money in the county treasury belonging to the county, the custody of which the treasurer is charged with, and it is made his duty "to use all reasonable and proper means to secure to the county the best terms for the depositing of the money *belonging to the county* consistent with the safe-keeping and prompt payment of the funds of the county when demanded." (*Italics are ours.*) By succeeding sections the power is given to county boards, city councils, school boards and township boards to direct the county treasurer to invest the sinking funds of such corporations in his hands in the warrants issued by each respectively.

In ordinary cases when money is collected by a county treasurer for the benefit of a separate public corporation, the county holds the money as trustee until drawn out by the treasurer of the district, village or city. At the time the depository law was passed, no drainage district corporations, of which the county treasurer was *ex officio* treasurer, were provided for by statute. If he collected funds for a drainage district then existing, it was his duty to pay it to the treasurer of the district on demand. As in the case of the funds belonging to a school district, or other public corporation, the treasurer of the district might preserve the interest for the benefit of his district by drawing the money from the county treasury and taking it within his own control. But, when a later statute made the county treasurer *ex officio* treasurer of drainage districts of the class then made possible, it became beyond the power of the district to protect itself by withdrawing the money from the county treasury and placing it within the district treasury. If we take the view that this is a county fund, the district will lose the interest, and the county will reap where it has not sown. We will not presume that it was the intention of the legislature to

Nemaha Valley Drainage District v. Nemaha County.

discriminate against the owners of land within the drainage district, by the special assessment of whose property the fund was created, by taking from them for the benefit of other taxpayers the accumulations of this fund. The money of such a drainage district as this, as soon as collected, passes automatically from the county treasurer, in his capacity as collector, into his custody as *ex officio* treasurer of the district. It is the general rule, where there is no statute to the contrary, that interest becomes a part of the fund by whose investment it was produced, and hence the interest belongs to the drainage district. It may be said that, while the statute does not require the treasurer of the drainage district to give a bond, it would seem that the bond required from the county treasurer should be sufficiently large to guarantee the safety of all moneys in his hands, whether he holds it merely and purely as county treasurer, or whether, by virtue of his office, he holds the same for the drainage district. This, evidently, was the idea of the county board, when it required an increased bond to cover the further liability. The county received its compensation for this by the collection fees provided for by statute, as later appears in this opinion. The district court properly found that the drainage district was entitled to the interest obtained by the county from the fund in the hands of the treasurer as *ex officio* treasurer of the district.

We come now to a consideration of the second cause of action. The levies made by the district, which were certified to the county clerk and by him to the county treasurer for collection, were made on two different dates, the first being for \$213,124.41, and the second for \$30,718.46. When he collected these taxes and assessments the county treasurer from time to time charged the regular collection fees, amounting in the aggregate to \$5,363.59, all of which he credited to the general fund of the county. The agreed statement of facts shows that the county treasurer never qualified as an officer of the drainage district by taking the oath of office and by giving bond to plaintiff

Nemaha Valley Drainage District v. Nemaha County.

for the safe-keeping of its funds; that by reason of his control of the plaintiff's funds his bond was increased \$100,000 and the expense of the premium on such bond was paid by the county; that the compensation of the county treasurer of defendant county had been fixed at \$2,000 and certain deputy and clerk hire; that the fees and charges for the collection of the regular taxes levied by the county, state and other subdivisions, authorized to levy taxes, paid all the fees of the office and deputy and clerk hire, and left a surplus without taking into consideration the collection of the special assessments and levies made by plaintiff.

Section 1855, Rev. St. 1913, makes the treasurer of the county "in which the drainage district, or the largest portion thereof, is situated," *ex officio* treasurer of said drainage district, "for the purposes of collecting and disbursing tax or assessments, and the treasurers of the counties in which the smaller parts of the district shall be situated shall pay over to him any and all funds collected and paid over to them for the benefit of the drainage district." Section 1858 provides: "The board of supervisors (of the district), except where otherwise provided, shall, by resolution, at the time of hiring or appointing, provide for the compensation for work done and necessary expenses incurred by any officer, engineer; attorney, or other employee, and shall also pay the fees of all court and county officers who may by virtue of this act render service to the district." We think this provision of the statute clearly sustains the judgment of the district court in favor of the county on plaintiff's second cause of action. The provision seems to be clear and unambiguous that the district shall pay the fees of all court and county officers who may by virtue of the act render service to the district. That the county, through its county clerk and county treasurer, rendered a large amount of valuable service in extending the taxes and assessments of the district upon the tax rolls and in the collection of the same, to say nothing of the expense which the county incurred in wise-

Rankin v. Kountze Real Estate Co.

ly increasing the bond of the county treasurer in a large sum, and in paying the expense incident to the obtaining of such bond, must be conceded. That services of this character are worth the amount of the fees charged by the county has been determined by the legislature, which fixed the amount of such fees. It seems to us that further comment on this branch of the case is unnecessary.

For the reasons above given, the judgment of the district court is

AFFIRMED.

SEDGWICK, J., not sitting.

**FRANCES A. RANKIN, APPELLEE, v. ELIZABETH KOUNTZE
REAL ESTATE COMPANY. APPELLANT.***

FILED JUNE 3, 1916. No. 13846.

1. Landlord and Tenant: REPAIRS: INJURY TO TENANT: LIABILITY.

Where the janitor of a building used for rental purposes is also charged with the duty of making such light repairs from time to time as seem to him to be needed, and repairs the threshold of a room in one of the apartments of such building, occupied and to be occupied by a tenant, he will be regarded as the servant of the proprietor of the building in the making of such repairs, and, if the same are negligently made, and as a result of such negligence a tenant is injured, the proprietor of the building will be liable therefor.

2. ———: ———: ———: ———. Where such repairing of the threshold was done in a way so careless and negligent that its use resulted in a nail, invisible and concealed in a board, entering the plaintiff's heel and wounding her when she stepped upon the threshold without knowledge of the dangerous condition of the same, the proprietor of the building will be held liable for wrongfully maintaining such threshold in such dangerous condition if the same would not have been seen and avoided by an ordinarily prudent person under like circumstances.

3. ———: ———: ———: ———. Where the tenant had been promised by the agent of the defendant that he would put the premises

*Reversed and dismissed on rehearing. See opinion, 101 Neb. ———.

Rankin v. Kountze Real Estate Co.

in good tenantable condition and keep the same in repair, it was the duty of the defendant to put said premises in good repair, and the tenant had a right to expect that the premises would be in good condition so that she might walk safely from one part thereof to another, and anywhere in the apartment which she occupied without wearing shoes.

4. ———: ———: ———: ———. Where the threshold of a door in an apartment used by a tenant is, by coming in contact with many feet, worn down in the center so as to leave it in a concave condition, and the owner of the building, by his servant, causes a thin and elastic board to be nailed across the top of the threshold and a nail is driven down through the unsupported part of the board into the bottom of the threshold or the floor upon which it rests, and by reason of such use the head of the nail is broken off, leaving a sharp point which does not protrude through the threshold but remains concealed therein or in said board, but when the threshold is stepped upon the board sags and causes the nail to be projected above the surface thereof, thereby rendering the threshold defective and dangerous, and a tenant, without knowledge of such defective condition of the threshold, and within a few hours after entering into the occupancy of such premises, steps upon the threshold and is injured by the penetration of such pointed nail into the foot, an action will lie in favor of the tenant and against the owner of the building for such injury.

APPEAL from the district court for Douglas county:
GEORGE A. DAY, Judge. *Affirmed.*

Duncan M. Vinsonhaler, for appellant.

Benjamin S. Baker and Charles H. Marley, contra.

HAMER, J.

This is an appeal from the judgment of the district court for Douglas county. The plaintiff and appellee, Frances A. Rankin, leased from the defendant, the Elizabeth Kountze Real Estate Company, a corporation, a certain apartment in a building containing six apartments. The apartment which she rented was on the first floor and on the south side of the building. On the north side of the same floor was another apartment. Between the two apartments was a hall extending east and west. It was a common hallway for the use of the two

apartments, and led to a toilet room which was also for the use of the occupants of both apartments. There was no direct connection with the toilet room from either of these two apartments. Access to the toilet room from the apartment leased by the plaintiff was through a door which led from the kitchen into the hall. The lease was obtained by the plaintiff from the defendant through its agent, Payne & Slater Company. It was an oral lease and included the use of the hall and toilet room. As a part of the terms of said lease, the defendant, through one Porter, acting on behalf of Payne & Slater Company, agreed with the plaintiff to put said premises in repair and in good tenantable condition, and to keep the same in such repair during the term of the lease. On the 1st day of January, 1911, the plaintiff moved into said apartment. About 9 o'clock in the evening of the same day, and after having removed her shoes, she started to go to the toilet room through the door communicating from the kitchen of said apartment with the said hall. In doing so she stepped with her left foot on the threshold of the door. She had only just moved in and was not familiar with the premises. This threshold had been repaired by placing a board lengthwise over the same and nailing it fast to the original threshold, which was worn away in the central part, leaving a concave space which the board covered. This board was elastic and springy, and there was no support under its center, and the board would go down as pressure was placed upon it and would spring back again when the pressure was removed. The nail used to repair said threshold had been driven through said board near the center and went down into the threshold and the floor which was underneath said board. The head of the nail was broken off so that it left a sharp point on the upper end of the nail, and when the weight of a person was placed upon said board the board would spring downward and then, coming back, would cause the nail to work up and down through the hole in the board and to extend above its surface. This condition existed at the

time the plaintiff rented the apartment. It was not known to the plaintiff at the time that she moved into the apartment nor was it known to her at any time until she received the injury. On the evening when she moved into the apartment, the plaintiff stepped upon this board, which was a part of the threshold, and when she did so the nail came up above the surface of the board and the point thereof ran into the plaintiff's heel the distance of about a quarter of an inch. The defendant had not advised any person of the condition of said threshold prior to the injury received by the plaintiff, but negligently and carelessly permitted the dangerous condition of said threshold to remain, and neglected to put the same in repair or in a safe condition, and wholly failed and neglected to notify the plaintiff of the condition of said threshold. The plaintiff testified that she saw Mr. Porter, an employee of of Payne & Slater Company, and asked him if he would put the place in good repair so that it would be fit to live in, and he said that he would fix everything up in good repair for her. He also stated that he would keep it fixed up. He fixed some boards in the floor and papered and painted two rooms. There was a janitor in this building named Norlen. He was under instructions to make ordinary repairs. He was to receive his rent free. He put the board over the threshold through which the nail worked that injured the plaintiff. He made ordinary repairs without submitting the matter to anybody. Norlen testified that he moved out of the apartment into which Mrs. Rankin moved, and went down into the basement, which had formerly been occupied by Mrs. Rankin. They appear to have exchanged apartments late in the afternoon of the same day. He said that, as far as he knew, there was a carpenter there every spring to set up the screens and do a little repairing. Norlen seems to have done whatever repairing was necessary to be done, at least he so testified. "Q. In the threshold leading from the kitchen to the hall there was a board placed on the original threshold. Tell the jury who put that board on there.

Rankin v. Kountze Real Estate Co.

A. I put one board on there myself." Later Norlen testified that he put the board along the threshold shortly after he moved in, and that the board was there until he moved out, and that that was the time when Mrs. Rankin moved out of the basement and moved upstairs into the apartment occupied until that time by Norlen. He further testified that there was a big space, and he put the board there because the cold weather began, perhaps in November. It was a strip of board which rested on the floor or threshold, he could not say which. "Q. How far did that extend? Did it go clear across the door? A. Clear across, from one jamb to the other. Q. Did that piece that you put down rest on the floor clear across? A. It rested on the floor or threshold, I could not say which. I do not remember which way I put it. * * * Q. Did it extend above the bottom of the door? A. In one side it did, at one corner of the door. The door is kind of sagged; the door was not level. It was open underneath in one corner about an inch space, and on that corner it was flush with the threshold. Q. Where this fitted up against the jamb, was the end sawed off square? A. Yes, sir. Q. And extended the full width of the—from jamb to jamb? A. Yes, sir. Q. And how did you fasten that down, Mr. Norlen? A. With nails."

Norlen put this dangerous board with the concealed nail in it over the threshold. The threshold, when repaired, was not such a thing as a competent carpenter would have constructed. Norlen knew, or should have known, what he had there. He was in the apartment a year and two months after he repaired the threshold. Norlen testified that he could not say whether the board over the threshold was in a condition to move up and down if anybody stepped on it, when he was questioned he said: "I could not say. I never noticed it. I did not pay any attention to it." This answer was somewhat evasive. The jury saw the witness and heard what he said, and they were in a position to judge understandingly about his testimony. When Norlen, as the servant of the owner

Rankin v. Kountze Real Estate Co.

of the property, drove the nail through the board which he placed over the cavity in the threshold, so that it went down through the board and into the solid body of the threshold, leaving the upper part of the nail so that the board would play up and down upon it, exposing the sharp end of the nail to the danger and risk of injury to any one stepping upon the threshold, he knew, or should have known, that the strange and unusual thing which he constructed was dangerous, and that the threshold after he undertook to repair it was uncouth and a wicked sort of trap full of threatening destruction to any one who might step upon it. The danger was concealed because the nail was invisible. It only protruded when the board was pressed upon, and then it rose above the surface.

Mr. Slater testified that it was an old building, but they aimed to keep it up in a good state of repair; that he did not have charge of the leasing, but he remembered that Mrs. Rankin was at their place, and that she made a change, and that the rent was paid to the firm of Payne & Slater Company. Slater testified that Porter represented his firm, the Payne & Slater Company. He was asked who was janitor down there, and testified: "A. Yes; we had a man. I forget his name. He was down there occupying one of the apartments. Q. Do you know his name? A. No; I forget his name. Q. Was it Norlen? A. Norlen, I think that was his name. Q. And for his work in and about the premises was his compensation anything more than the rent free? A. No; he received his rent free. * * * Q. What were Mr. Norlen's duties there? A. Mr. Norlen was put down there mainly because we had had a lot of trouble with the water pipes freezing out, especially at night when there wasn't any water drawn off, and the water would stand still, and so his duties were to shut the water off at the base of the supply line in the basements and then turn it on in the morning. His duties, also, were to notify our office of any vacancies, and to collect the keys and take care of the keys down there. * * * Q. As a matter of fact Mr. Norlen did do some

Rankin v. Kountze Real Estate Co.

repairs on the sidewalk and look after the yard, and do some repairs in the house? A. I do not know of them. He may have done some repairs. I think that he looked after the yard, and mowed the grass, if there was any, and mowed weeds and something like that. * * * Q. Did I understand you that Mr. Norlen received his authority from Mr. Porter, or your firm? A. Yes; I think he was at that time working under Mr. Porter. Q. And what he did was for your firm? A. Yes. Q. And Mr. Porter was representing the firm? A. Yes, sir."

C. A. Appleby testified that he knew Mrs. Rankin; that he lived in the same place; that he knew about the threshold of the door leading from the hall into the kitchen; that "the threshold had worn down, as any board will do by constant walking over it." He saw the original board. "It was a rude piece of construction. It was a very weak piece of board. * * * When I went across there I noticed a slight give in it (the board), and I stopped to think what a rude piece of construction and repairing was done on that door." He knew that Norlen was accustomed to making repairs.

Mrs. McElhinney testified that the board had been laid lengthwise of the threshold so that it extended over the worn place where the threshold had been eaten out by coming in contact with many feet. As the nail had been driven through a springy board, when the board was stepped on it slipped down the nail as far as the weight upon it compelled it to go, and then, when released from the weight which pressed it down, it would immediately spring back to its former position. In time this wore the head from the top of the nail, or it broke off, and the top of the nail became sharper and sharper as the board worked up and down upon it. To the casual observer the nail was invisible. Any one stepping on this board was likely to be cut by an invisible lancet carrying great power to injure by reason of its concealment. She indicated how far the nail would project when stepped upon, and said, "When you stepped on the threshold there was a nail.

Rankin v. Kountze Real Estate Co.

The head of the nail looked like it had been worn off. The head had been worn off with the nail projecting through the threshold about a quarter of an inch, I judge.

Q. Extending above it? A. Yes, sir."

Mrs. Rankin, the plaintiff, testified that she first occupied the apartment in the basement on the south side, and then she went up immediately over that apartment into the next apartment on the south side. She made arrangements for the second floor with Mr. Slater, of the firm of Payne & Slater Company, the latter part of 1910, the last week in December. She first talked with Mr. Porter, who collected the rents of the building, and then talked with Mr. Slater over the telephone, and he said he would send Mr. Porter down, and she could move upstairs. She exchanged apartments with Mr. Norlen. Porter came down from Payne & Slater Company, and told Mrs. Rankin that they said she could exchange with Mr. Norlen. She then moved upstairs, and Norlen moved down into the apartment which she had just occupied. She was to pay \$10 a month as rent for the apartment which she took upstairs. They had some papering and carpenter work done for her. "Q. What did you say to him, and what did he say to you concerning what was to be done in case you leased it? A. Well, I asked him (Porter) if he would put the place in good repair so that it was fit to live in, and he said they would fix everything up in good repair for me. Q. What about keeping it in repair? A. Yes; keep it up. Q. And what did he do in pursuance of that, what was done in pursuance of that? A. He fixed some boards in the floor and painted and papered two rooms. Q. And when was this done, this work done, with relation to the time you went in? A. Well, it was the first days in January."

The street seems to have been filled so that the second floor became the first floor. She testified that she got her injury on the second floor, that is, the floor to which she moved; that she paid rent for the room that she occupied where she was injured; that her sister went and paid the

Rankin v. Kountze Real Estate Co.

rent and took a receipt for it; that the toilet on the floor to which she moved was for two apartments, one on the south side, and one on the north side; that Mrs. Appleby occupied the one on the north side, and she occupied the one on the south side.

Mrs. Rankin testified to the manner of receiving her injury: "Well, I was very tired after moving, and I removed my shoes, and as I stepped out from the kitchen. * * *

Q. Tell what happened? A. As I stepped out I got my heel on the threshold and stepped on a nail which went into the large part of my heel."

The plaintiff testified that she was an experienced nurse, but that she is unable to follow her business as a nurse since receiving the injury. She had taken instructions in nursing in Oklahoma City, and was also employed in the Clarkson Hospital in Omaha. She had about 20 years' experience.

Porter testified that he was at the building every day while his company had charge of it. Porter promised the plaintiff, according to her testimony, to keep up the repairs; but he denied it. Norlen seems to have had authority to make repairs. At least he made them when he saw fit. Porter made such repairs as he thought proper. Norlen and Porter were therefore engaged in looking after the building and in making repairs upon it. As Porter was the secretary of the Payne & Slater Company, which was the agent of the defendant company, he was not the servant of the defendant company, but an agent, while Norlen, who lived in the building, was the servant of the defendant company. He was the janitor and, like other janitors, lived in the basement of the building without paying rent.

The plaintiff's brother, Victor Snygg, was present when she was injured. He looked for the nail that inflicted the wound and could not find it. He could not spring the board down with the mere weight of his hand, but finally did it with the weight of his body resting on his knee. He said the nail would protrude a quarter of an inch.

Rankin v. Kountze Real Estate Co.

The testimony of the witness Mrs. Anna Brown shows horrible suffering upon the part of the plaintiff. The doctor had removed the bones inside of the heel so that the witness could almost put her fist in the cavity. They would remove the bandage and pull the gauze out of the cavity. The last operation was more severe than those preceding it. "They dug into the bone still more, and I saw where they scraped it out until the red blood would come, too."

Dr. Mack testified that the wound was about a quarter of an inch deep, inflamed, and that there was a considerable discharge from it; that it was extremely tender, and that the plaintiff complained of severe pain; that he inserted a probe into the wound and found it to be about a quarter of an inch deep, and probably about an eighth of an inch in diameter; that blood poisoning had developed at the time of his examination; that when he opened the wound he cleansed the part as antiseptically as he could, and then put a little knife in carbolic acid and in alcohol and opened the wound with it; that he removed the tissue which was sloughing; that he then cauterized the wound, that is, burned it with carbolic acid; that after burning it out he applied antiseptic dressing; that the next day he removed the dressing and applied another antiseptic dressing; that the tissue was degenerating, that it was dying; that the next morning after that he was telephoned to come, and that he went to see her and found the foot badly swollen, and that she was suffering intensely, and he then took her to the hospital; that when they arrived at the hospital he immediately took her to the operating room and gave her an anaesthetic and opened the foot and gave it a thorough cleaning out; that he made an incision an inch and a half long in the heel and probably an inch in depth until he thought he had gotten beyond the area of infection; that this was on the 8th day of January, and on the 9th of January he dressed the foot, and again on the 10th of January, and found that the sloughing or dying of the tissue had gone

Rankin v. Kountze Real Estate Co.

on beyond; that he operated on the foot again on the 10th; that the foot was opened still further and deeper and was cleaned out again; that he dressed her foot every day until the 22d of January, when she was operated on again, this time going still deeper and making the opening still larger; that he dressed the foot every day until the 17th day of February, when she was again given an anaesthetic and a very extensive operation was made; that the bone in the heel called the os calcis had completely degenerated, and it was removed, and practically all of the tissue within the heel was removed because of its sloughing; that he dressed the foot regularly until the 1st day of April, when the plaintiff was dismissed from the hospital; that each day he would pack into the wound a strip of gauze a yard long and about two and one-half inches wide; that he removed the packing and irrigated the foot with an antiseptic solution, using about two quarts of the same; that there were four operations, and that these operations were necessary; that the condition was the natural and probable result of the penetration of the nail into the foot producing the puncture which he found.

Dr. Mack testified that, because of the injury which she had received, the plaintiff would be unable, after walking a block or two, to stand on her foot; that there was no question but that there was a permanent injury of the nervous system beyond the removing of the bone.

"Q. What would you say, in her condition, knowing all about the duties of nurses, whether or not she would ever be able to continue that calling of nursing? A. She will never be able to do general nursing. Q. She will never be able to do that? A. She will not." He also testified that she had been a good nurse; also, that she had received for her work \$20 and \$25 a week.

Mrs. McElhinney testified that she knew Mrs. Rankin to be very strong when she was a girl, and in perfect health before she was injured. She went to see Mrs. Rankin in the hospital every day for three months. She testified: "I saw Dr. Henry split her heel open clear to the bone,

Rankin v. Kountze Real Estate Co.

turn it back and scrape it and take part of the bone away, and sew it up again."

We have carefully read all the evidence. The plaintiff was so injured that witnesses testify she will be unable to continue her occupation. The bones in the heel appear to have been removed. Apparently she is likely to be a cripple all her life.

In the sixth instruction the following language is complained of: "In considering the question as to whether the defendant knew of the condition of the threshold, you are instructed that the law charges the defendant with such knowledge as was actually brought to its attention, or such knowledge as it would have had, had it exercised ordinary care with respect to the premises." This cannot be prejudicial to the defendant, because if the defendant's servant had exercised ordinary care he would have known, and his knowledge must be the knowledge of the defendant. He was on the ground and what he did he did on behalf of the defendant.

The seventh instruction contains the idea that the defendant was only required to act as any ordinary person would have done under like circumstances, and, if the jury believe that the defendant so acted, then the defendant is not liable. We find nothing prejudicial to the defendant in this.

In *Young v. Rohrbough*, 84 Neb. 448, the law appears to be laid down that, where the landlord leased premises defective in construction and an injury occurs on account of such defective construction, then the landlord is liable for such injury, if he knew, or under all the circumstances ought to have known, of such defective condition. The plastering fell off the walls of the room and killed a lady member of one of the fraternal societies which rented it. The building was constructed by the Rohrboughs, but they afterwards sold and transferred it to the Commercial Building Company. In the suit brought by the administrator, the Rohrboughs and the Commercial Building Company were each made defendants. On the

trial of the case in the district court it was held that the Rohrboughs were not liable, but there was a verdict and judgment against the Commercial Building Company. It appealed. There was a contention made that, if the Rohrboughs were not liable, then the Commercial Building Company was not liable. This court held that the judgment was properly rendered against the Commercial Building Company. On a rehearing a new trial was granted, *Young v. Rohrbough*, 86 Neb. 279; but the rule laid down in the former *Rohrbough* case was left unmodified and unchanged, although the former judgment of this court was vacated and the judgment of the district court was reversed, yet it was for a new reason not before considered in the case, and based upon the doctrine that, "where all the defendants are by the court's instructions placed in the same relation with respect to the plaintiff, a verdict in favor of two defendants and against another, based upon conflicting evidence which is the same as to all of the defendants, will not be permitted to stand." In the body of the opinion it is said: "For the reasons above stated, our former judgment of affirmance is set aside, the judgment of the district court reversed as to the defendant Commercial Building Company, and the cause remanded for further proceedings." The opinion cites *Gerner v. Yates*, 61 Neb. 100, where it was held: "A verdict in favor of one defendant and against another, based upon conflicting evidence which is the same as to both defendants, cannot be permitted to stand as to either."

In the instant case the landlord specifically agreed, according to the evidence, to put the premises in good repair for occupancy and to keep them so. The threshold was in a dangerous condition at the time of making the lease, and at the time the plaintiff took possession of the premises, and it was made dangerous by the servant of the defendant, Norlen, and it was maintained in its dangerous condition by the defendant.

In *Carson v. Godley*, 26 Pa. St. 111, the landlord was held liable for injury resulting to the plaintiff in the

Rankin v. Kountze Real Estate Co.

fall of the building in which poor material had been used, and which was poorly constructed. It was stated in the opinion: "Such is the eagerness of capitalists for large rewards that, when they undertake to build for the profits of rents, the temptation is strong to cheapen and slight the work. The safety of life and property is lost sight of in the dazzling prospect of a large rent from a small outlay. Foundations are put down and walls run up in such haste and with such materials as to be wholly inadequate for the purposes designed. * * * But where, as in the case before us, it is found, on abundant proof, there was no negligence either in the tenants or the plaintiff, it is a salutary rule of law that holds the owner answerable for his gross neglect in constructing and renting an insecure building."

As the defendant agreed with the plaintiff to put said premises in good tenantable condition and to keep the same in repair, the defendant is liable for the damages that resulted because of the breach of the contract which was made. The law should be so applied that the blame for the maintenance of the trap which Norlen constructed should be properly borne.

"If a landlord lets premises and agrees to keep them in repair, and he fails to do so, in consequence of which any one lawfully upon the premises suffers injury, he is responsible for his own negligence to the party injured." *Edwards v. New York & H. R. Co.*, 98 N. Y. 245.

This case is widely different from *Davis v. Manning*, affirmed in 97 Neb. 658, and reversed and overruled on rehearing in 98 Neb. 707. The plaintiff in that case alleged that a part of the floor of the kitchen near the stove was in a dangerous and defective condition; that the "under portion of the boards of the floor were rotted, leaving but a thin upper part solid and apparently strong; that the floor at said place was near the ground; that the defendants, and each of them, knew, and should have known by the exercise of reasonable diligence, of the dangerous and

defective condition of said floor at said place;" that they apparently failed to notify the plaintiff; that Manning constructed the building in about 1875 and lived in it many years; that he knew that the floor was near the ground and that under parts would rot; that the plaintiff was preparing her breakfast and was standing before the stove and was about to step from the stove to the pantry; that she was standing on the said rotten and defective floor when "a part of one of the floor boards broke through, causing a hole 7 by 2½ inches in size, into which the heel and a portion of plaintiff's left foot passed, thereby throwing plaintiff, while the heel of her foot remained in said hole, onto the floor on her left side, * * * and fracturing and breaking her left thigh bone, and fracturing two of the lower ribs on her left side."

The main difference between the instant case and the case cited is that in the case cited the plaintiff had a much better opportunity to know the facts than the plaintiff in this case. In the case cited the sloping ground which would carry the water under the house was visible. That there was no ventilation could also be seen. That the house had been constructed a long time was apparent by looking at it; that there were cracks in the floor that had been covered with tin, and which showed that the floor had rotted out and was in a very defective condition. In the case cited, of course, all of these things were visible to the plaintiff. In the instant case the sharp, pointed nail was concealed. The operation of the springy board was unknown. The plaintiff had no reason to know anything about it.

The opinion on the rehearing in *Davis v. Manning*, *supra*, does not demand the reversal of the judgment of the district court in this case. The verdict is for \$8,750 in favor of the plaintiff. It is fully sustained by the evidence, and does not seem to be excessive when the injury done is considered. We are unable to say that there is

Hall v. State.

error in the proceeding of the district court, and the judgment appears to be right.

The judgment of the district court is

AFFIRMED.

LETTON and ROSE, JJ., dissenting.

SEDGWICK, J., not sitting.

CUSHMAN C. HALL V. STATE OF NEBRASKA.

FILED JUNE 3, 1916. No. 19451.

1. **Constitutional Law: SALE: CHOLERA SERUM.** Section 2, ch. 170, Laws 1915, providing: "No person, firm, or corporation shall sell, barter, exchange, carry, give away, ship or deliver for shipment any anti-hog cholera serum or virus within the state of Nebraska unless such person, firm, or corporation shall first hold an uncanceled, unexpired United States government veterinary license, issued by the United States Department of Agriculture, and a permit from the Live Stock Sanitary Board"—is an attempted restriction on the power of the citizen to buy and sell anti-hog cholera serum, and is unconstitutional, for the reason that any person has the right to adopt and follow any lawful industrial pursuit which is not injurious to the community.
2. **Monopolies: ACT IN RESTRAINT OF TRADE.** Such act, in effect, gives a monopoly to the serum-manufacturing plant, because it is the plant that is licensed under the federal act, and section 2 of the Nebraska act gives the right to sell, barter, exchange, carry, or give away to the person holding an unexpired and uncanceled United States Veterinary license issued by the United States Department of Agriculture; such person being the only person allowed to hold a permit from the Live Stock Sanitary Board.
3. ———: ———: ———. It is provided in 37 U. S. St. at Large, ch. 145, pp. 832, 833: "That from and after July 1, 1913, it shall be unlawful for any person, firm, or corporation to prepare, sell, barter, or exchange, * * * or to ship or deliver for shipment from one state or territory * * * to any other state or territory * * * any worthless, contaminated, dangerous, or harmful virus, serum, toxin, or analogous product intended

Hall v. State.

for use in the treatment of domestic animals." It is also provided that no person, firm, or corporation shall prepare, barter, exchange or ship such virus, serum or toxin unless and until the same shall have been prepared under and in compliance with regulations prescribed by the secretary of agriculture and at an establishment holding an unsuspended and unrevoked license issued by the secretary of agriculture. As it is only an establishment of this kind that is permitted such a license, section 2 of the Nebraska act confines the right to sell, barter, exchange, carry, give away, ship or deliver for shipment such anti-hog cholera serum to the *plant* holding such license, and no *person* may have such permit under the Nebraska act, for only a *plant* is licensed.

4. **Constitutional Law: ACT IN RESTRAINT OF TRADE.** Section 9, ch. 170, Laws 1915, provides: "No person, firm, or corporation shall give or accept a rebate or commission on any anti-hog cholera serum or virus that is sold or offered for sale within the state of Nebraska"—and also provides a punishment for the violation of the act. This is an additional bar preventing the farmer from purchasing serum with which to treat his own hogs, and preventing the veterinary surgeon from purchasing serum with which to treat the hogs belonging to his employers. Because of the bar of this provision, section 9 of the state law is unconstitutional and void.

ERROR to the district court for Douglas county: CHARLES LESLIE, JUDGE. *Reversed and dismissed.*

Arthur F. Mullen, for plaintiff in error.

Willis E. Reed, Attorney General, and *Charles S. Roe*, *contra*.

HAMER, J.

The plaintiff in error, Cushman C. Hall, seeks to review the judgment of the district court for Douglas county. He was fined \$50 and costs. The first count in the information charges the unlawful selling by the defendant on the 6th day of August, 1915, to Frank C. Mitchell of 500 cubic centimeters of anti-hog cholera serum for the sum of \$12; that the defendant at the time of the sale did not hold an uncanceled, unexpired United States veterinary license issued by the United States Department of Agriculture, and did not hold a permit from the Live Stock Sanitary

Hall v. State.

Board of the state of Nebraska to sell anti-hog cholera serum; that said defendant had not given a bond to the said sanitary board in the sum of \$5,000 prior to the sale of the said serum; and that said defendant unlawfully and knowingly sold said serum without having complied with any of the provisions of chapter 170, Laws 1915. The second count charges that at the time of the said sale there was no price marked on the bottle containing said serum, and therefore that the sale was unlawful and in violation of the provisions of said chapter. The third count charges the receipt by the said defendant of a rebate of \$1 paid by the said Mitchell, and that the same was so received by said defendant wilfully, knowingly, and unlawfully. The three offenses charged are all alleged to arise out of the same transaction. The defendant demurred to each count in the information, and each demurrer was overruled. At the conclusion of the introduction of the evidence, the defendant moved that the court find him not guilty. This motion was overruled.

It is claimed by the defendant that the district court erred in holding that the law under which the prosecution is brought is constitutional. Laws 1915, ch. 170. In the brief of the attorney general it is said that "The state is compelled to concede that the act contains provisions that are inconsistent, and that the law as passed does not answer satisfactorily the purpose for which it was enacted."

Section 2 of the state law is as follows: "No person, firm, or corporation shall sell, barter, exchange, carry, give away, ship or deliver for shipment any anti-hog cholera serum or virus within the state of Nebraska unless such person, firm, or corporation shall first hold an uncanceled, unexpired United States government veterinary license, issued by the United States Department of Agriculture, and a permit from the Live Stock Sanitary Board." Laws 1915, ch. 170.

The Department of Agriculture, realizing the losses that were resulting to the hog raisers of the country from the promiscuous manufacture and distribution of anti-hog cholera serum, secured the enactment of a law intended

Hall v. State.

to regulate the preparation, sale and distribution of such serum. The act provides that after July 1, 1913, it shall be unlawful to prepare, sell, barter or exchange in the District of Columbia, or in the Territories, or in any place under the jurisdiction of the United States, any worthless, contaminated, dangerous, or harmful virus, serum, toxin, or analogous product intended for use in the treatment of domestic animals; also, that no person, firm, or corporation shall prepare, sell, barter, exchange, or ship any virus, serum, toxin, or analogous product manufactured within the United States and intended for use in the treatment of domestic animals *unless and until* the said virus, serum, toxin, or analogous product shall have been prepared under and in compliance with regulations prescribed by the Secretary of Agriculture at an establishment holding an unsuspended and unrevoked license issued by the Secretary of Agriculture. The act further prohibits the importation into the United States of any worthless, contaminated, dangerous, or harmful virus, serum, toxin, or analogous product. The Secretary of Agriculture is authorized to cause the Bureau of Animal Industry to examine and inspect all viruses, serums, and analogous products imported into the United States, or offered for importation, and the same are denied entry if it appears that they are worthless, dangerous or harmful. The Secretary of Agriculture is also authorized to prepare such rules and regulations as may be necessary to prevent the preparation, sale, barter, exchange, or shipment of any such worthless, dangerous, or harmful virus, serum, or toxin. He is also authorized to issue permits for the importation into the United States of viruses, serums, toxins, and analogous products for use in the treatment of domestic animals. Each license is to be issued on condition that the licensee shall permit the inspection of such establishment, and of such product and the preparation of the same, and the Secretary of Agriculture is authorized to suspend or revoke any permit or license issued under authority of the act after an opportunity for hearing has been granted to the licensee or importer; also,

Hall v. State.

any officer, agent, or employee of the Department of Agriculture is authorized by the Secretary of Agriculture to enter and inspect any establishment licensed under the act where any virus, serum, toxin, or analogous product is prepared for sale, barter, exchange, or shipment. Violation of the act is to be deemed a misdemeanor, and conviction is to be punished by a fine not exceeding \$1000, or imprisonment not exceeding one year. 37 U. S. St. at Large, ch. 145, pp. 832, 833.

It will be seen that the act provides that plants shall be licensed, and that they may not prepare this serum for shipment unless they are licensed. A United States veterinary license does not appear to have been provided for the use of a *person*, but for the use of manufacturers of the serum. *The license is to the plant.* The Nebraska act seeks to give to those manufacturers the exclusive right to sell the serum, and it denies to the citizen of Nebraska the right to sell it. The manufacturing plant, under the federal act, gets a United States veterinary license issued by the Department of Agriculture. The provision of section 2 is that there shall be no permit from the Live Stock Sanitary Board, except to one who holds a license from the United States Department of Agriculture. The effect of this is that no person may have a license, and a license can only be issued to the manufacturing plant, which alone may sell. This provision contained in section 2 creates a monopoly, because it confines the sale of the serum to the plant which manufactures it.

The attorney general says: We are compelled to concede that the law as passed contains inconsistent provisions as already pointed out, and we do not argue for the approval of the law in its present form. He then declines to "discuss particularly the constitutional questions so extensively considered in defendant's brief." The license issued is to those engaged in the manufacture of serum. The federal permit is designated a "United States government veterinary license." We do not understand that the federal government undertakes to regulate those

Hall v. State.

who sell serum after it has been disposed of by the manufacturer. The act of 1915 undertakes to prevent the citizens of this state from buying and selling serum unless they have a United States government veterinary license. As the United States government does not issue such a license, except to the manufacturer, the effect of the Nebraska act is that no one has a right to sell serum except those who manufacture it. This creates a monopoly. Of necessity it must be wrong. The legislature does not have the power to deprive its citizens of the right to sell serums that are up to the standards prescribed by law and which have been manufactured in establishments approved by the federal government.

Section 3, art. I of the Constitution, provides: "No person shall be deprived of life, liberty, or property, without due process of law."

Section 9, ch. 170, Laws 1915, provides, among other things: "No person, firm, or corporation shall give or accept a rebate or commission on any anti-hog cholera serum or virus that is sold or offered for sale within the state of Nebraska. Any person, firm, or corporation, violating any of the provisions of this section shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined in any sum, not less than ten dollars (\$10) and not more than five hundred dollars (\$500)."

This is an additional bar preventing the farmer or veterinary surgeon from purchasing serum with which to treat hogs.

"While every man has a right to require that his own controversies shall be judged by the same rules which are applied in the controversies of his neighbors, the whole community is also entitled, at all times, to demand the protection of the ancient principles which shield private rights against arbitrary interference, even though such interference may be under a rule impartial in its operation." Cooley, *Constitutional Limitations* (7th ed.) p. 504.

A person living under the protection of the United States government has the right to adopt and follow any

Hall v. State.

lawful industrial pursuit, not injurious to the community, which he may see fit, and, as incident to this, the right to labor or employ labor, make contracts in respect thereto upon such terms as may be agreed upon by the parties, and to inherit, purchase, lease, sell and convey property of all kinds. The enjoyment or deprivation of these rights and privileges constitutes the essential difference between liberty and oppression. These principles have been fully recognized and announced in many decisions of the supreme court of the United States, and other courts. *Yick Wo v. Hopkins*, 118 U. S. 356.

In *Braceville Coal Co. v. People*, 147 Ill. 66, 22 L. R. A. 340, the question of the right to enter into contracts by which labor may be performed in such a way as the laborer may deem beneficial to others to employ such labor was considered. The legislature passed an act requiring a regular payment of wages by certain classes of corporations. The court held that this was arbitrary and unconstitutional; that the employer and employee had a right to make lawful contracts regarding the time of payment. In discussing the right to enter into contracts, the court said: "The fundamental principle upon which liberty is based, in free and enlightened government, is equality under the law of the land. It has accordingly been everywhere held that liberty, as that term is used in the Constitution, means not only freedom of the citizen from servitude and restraint, but is deemed to embrace the right of every man to be free in the use of his powers and faculties, and to adopt and pursue such avocation or calling as he may choose, subject only to the restraints necessary to secure the common welfare." *Commonwealth v. Perry*, 155 Mass. 117, 14 L. R. A. 325; *People v. Gillson*, 109 N. Y. 389.

In *Commonwealth v. Perry*, *supra*, it was said: "Article I, sec. 10 of the Constitution of the United States, provides, among other things, that no state shall pass any 'law impairing the obligation of contracts.' The right to acquire, possess, and protect property includes the right to make

Hall v. State.

reasonable contracts, which shall be under the protection of the law. * * * The right to employ weavers, and to make proper contracts with them, is therefore protected by our Constitution; and a statute which forbids the making of such contracts, or attempts to nullify them, or impair the obligation of them, violates fundamental principles of right which are expressly recognized in our Constitution."

Adair v. United States, 208 U. S. 161, and *State v. Sperry & Hutchinson Co.*, 94 Neb. 785, support the views here expressed. The act creates a combination in restraint of trade. It permits the manufacturers of serum to monopolize the entire business of selling it in the state. It also makes it unlawful for any other person than the makers of serum to sell or vend it.

If this law is permitted to stand, it means that the serum plants in Nebraska which have received a United States government veterinary license have a monopoly of the right to sell anti-hog cholera serum. The law not only seeks to give these serum plants a monopoly on the right to sell serum, but it attempts to fix the price by requiring the manufactures to mark on the outside of the bottle the price at which it is sold, and then provides further that it is a misdemeanor for any one to give or accept a rebate or commission on any serum sold. It creates a monopoly of the right to sell, and then requires those who have the monopoly to fix the price, and then it makes it unlawful for them to change the price.

It is provided in section 1, art. XIV of Amendments to the Constitution of the United States: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Hall v. State.

We are of the opinion that the second and ninth sections of the act are unconstitutional, and that there is no law justifying the imposition of the fine sought to be imposed.

The judgment of the district court is reversed, the case dismissed, and plaintiff in error discharged.

REVERSED AND DISMISSED.

LETTON and ROSE, JJ., dissent.

SEDGWICK, J., dissenting.

The defendant was found guilty of selling anti-hog cholera serum without complying with the statute. Laws 1915, ch. 170. He has brought the case to this court, and insists that the statute is unconstitutional and wholly void. The majority opinion appears to so hold. In the first paragraph of the syllabus it is said that section 2 of the act is void, "for the reason that any person has the right to adopt and follow any lawful industrial pursuit which is not injurious to the community." The second paragraph of the syllabus says: "Such act," meaning, I take it, the above cited statute, "in effect, gives a monopoly to the serum manufacturing plant." And the third paragraph says: "No person may have such permit under the Nebraska act, for only a plant is licensed." In the opinion it is said: "The Nebraska act seeks to give to those manufacturers the exclusive right to sell the serum. * * * A license can only be issued to the manufacturing plant, which alone may sell. This provision contained in section 2 creates a monopoly, because it confines the sale of the serum to the plant which manufactures it." This idea is repeated several times in the opinion, and it seems that the intention is to hold the entire act void because of the construction that is put upon section 2 of the act. The attorney general concedes that section 2 of the act, construed literally, is inconsistent with other provisions of the act, and contends that the section should be construed in the light of the other provisions, and so render the meaning plain as the legislature intended. This sugges-

Hall v. State.

tion of the attorney general is not discussed nor even mentioned in the opinion, and so it appears that the whole act is rendered unconstitutional by the use of the word "and," instead of the word "or," in one section of the act, although in a similar provision in another section (section 9) the legislature has clearly expressed its meaning, and has even used the proper conjunction in so doing.

Congress had undertaken to regulate the manufacture and sale of "virus, serum, toxin, or analogous product" in the territories and in interstate commerce. The object of our statute was to regulate the manufacture and sale of the serum within the state. The intention was to require a state license in those cases that were not, and under the provisions of the Constitution could not be, regulated by the federal government, and so this statute was enacted to supplement the act of congress. It was intended that any one properly authorized by the act of congress to manufacture and sell the serum should be recognized by this statute as authorized to do so, and that other persons might be authorized to manufacture and sell the same within the state. The intention of the legislature was to recognize those who were duly authorized by act of congress as being fully authorized, and to require others who were not governed by that act to obtain a license from the state.

It is stated in the title of the act that the purpose of the act is: "To empower the State Veterinarian, Deputy State Veterinarian, through the Live Stock Sanitary Board, to permit the manufacture, sale, distribution, and to report on application of anti-hog cholera serum and virus, as provided in this act." The first section of the act prohibits the sale, etc., of the serum "as hereinafter provided," and by section 9 of the act no one is to sell the serum without the license of the state, or the Department of Agriculture, or both. Section 6 of the act provides that section 1, which is the section which makes it unlawful to sell the serum, except as provided in the act, "shall not apply to persons, firms, or corporations who

Hall v. State.

have complied fully with the regulations and orders of the Live Stock Sanitary Board, and shall have received a permit to sell serum or virus in this state." This is a direct provision that it shall not be unlawful for persons who have a permit from the state to "sell, barter, exchange, carry, give away, ship or deliver for shipment, any anti-hog cholera serum or virus within the state of Nebraska." Section 2 of the act, which is now held to invalidate the whole act, provides that no person, firm, or corporation shall sell, etc., the serum, within this state unless he is authorized by the act of congress *and* has a permit from the state. The purpose of the act and all of its provisions construed together indicate that this section should be construed as though it read, "Any person, firm, or corporation who shall hold a government license and any person who shall hold a permit from the state may sell," etc. This meaning would be given to the statute if the conjunction "or" had been used in place of the conjunction "and," and where it is so manifest that that is the intention, such intention being plainly expressed, as we have seen in the title and other sections of the act, it is always held permissible to read the conjunction "or" in place of the conjunction "and." There can be no possible doubt that this was the intention and meaning of the legislature.

That the manufacture and sale of this serum in this state is a proper subject of regulation within the police power of the state cannot be doubted, and the act of the legislature, which appears to be necessary and proper legislation in all other respects, ought not to be held invalid for the inadvertent use of the wrong conjunction in one of the sections. The fourth paragraph of the syllabus says that section 9 of the state law "is an additional bar preventing the farmer from purchasing serum with which to treat his own hogs, and preventing the veterinary surgeon from purchasing serum with which to treat the hogs belonging to his employers," and "because of the bar" section 9 is void. I do not think that this section calls

Steinkuhler v. State.

for such discussion and criticism; but, as the whole act is declared void, and it is doubtful if effective regulation of the subject is possible under the majority opinion, I will not discuss this ninth section.

HERMAN STEINKUHLER V. STATE OF NEBRASKA.

FILED JUNE 23, 1916. No. 19585.

1. **Intoxicating Liquors: SALES TO MINORS.** "In a prosecution against a saloon-keeper for selling intoxicating liquors to a minor, it is no defense that accused acted in ignorance of the minor's age and without any intent to violate the law." The mere fact of selling intoxicating liquors to a minor constitutes the entire offense. *Seele v. State*, 85 Neb. 109.
2. ———: ———: **SALES BY EMPLOYEES.** In the sale of intoxicating liquors to minors, the owner or keeper of a saloon is responsible for the acts of his servants and employees, and a sale by an employee or bartender of a saloon-keeper is, in law, a sale made by the saloon-keeper himself, unless such sale is made in defendant's absence and in violation of his orders.
3. ———: ———: **QUESTION FOR JURY.** If sales are made to any minors by a saloon-keeper's bartenders, without his authority and against his will, contrary to his instructions and when he was not present, he would not be responsible in a criminal prosecution for such sales; but whether instructions not to sell to minors are given by the saloon-keeper to his bartenders in good faith with the expectation that they will be obeyed, and with the intention that they should operate as a limitation upon the authority of such bartenders to make sales to minors, is a question of fact to be determined by the jury.
4. ———: **CONVICTION: SUFFICIENCY OF EVIDENCE.** The bill of exceptions examined, and held that the evidence was sufficient to sustain the conviction.

ERROR to the district court for Johnson county: **JOHN B. RAPEE, JUDGE.** *Affirmed.*

JAY C. MOORE, for plaintiff in error.

Willis E. Reed, Attorney General, Charles S. Roe and S. P. Davidson, contra.

Steinkuhler v. State.

BARNES, J.

Herman Steinkuhler was tried by the district court for Johnson county on an information containing 20 counts, each of them charging him with having sold intoxicating liquor to minors. To the information Steinkuhler pleaded not guilty. A jury was impaneled, the evidence was taken, and the court instructed the jury, among other things, to find the accused not guilty on the eighth count of the indictment. After deliberation the jury returned a verdict of guilty on the other 19 counts of the indictment. A motion for a new trial was filed and overruled, and the accused was sentenced to pay a fine of \$25 on each count, together with the costs of the prosecution. He has brought the case to this court by a petition in error, and hereafter the defendant in error will be designated as the state, and Steinkuhler will be called the defendant.

It is defendant's contention that the evidence was not sufficient to sustain the verdict, and he argues that no fair-minded man could say that he was guilty of the offense charged beyond a reasonable doubt. This point, however, is not pressed with much vigor, and indeed we think it could not have been seriously relied on for a reversal of the judgment. The testimony fairly shows that the defendant had been engaged in the sale of intoxicating liquors in Sterling, Nebraska, for several years; that he was well acquainted with the young men and boys in that vicinity; that he saw them frequently in his saloon, and his bartenders served them whenever they ordered intoxicating liquors, without objection or even reproof on his part; that he had sometimes served them with such liquors himself. The testimony also shows that the persons mentioned in the indictment as minors, to whom intoxicating liquors had been sold, were well known by the defendant and his bartenders to have been less than 21 years of age. The evidence contained in the bill of exceptions was amply sufficient to sustain the verdict on each count of the indictment.

Defendant's second contention is that the court erred in giving the jury instruction No. 8 on his own motion. That instruction reads as follows: "If you find from the evidence beyond a reasonable doubt that a sale of intoxicating liquor was made by the defendant to any of the persons, minors, as alleged in the indictment, then it is not necessary for the state to prove the intent or motive of the defendant in making such sale. Neither is it necessary for the state to prove that such sale was made to the minor knowingly. A liquor dealer is bound to know that the person he sells liquor to is not a minor, and ignorance of the age of the person to whom the liquor was sold is no excuse, and, irrespective of good faith and honest intention, the mere fact of selling liquor to a minor constitutes the entire offense."

This court has spoken upon the above question in *Seale v. State*, 85 Neb. 109, where it was said: "In a prosecution against a saloon-keeper for selling intoxicating liquors to a minor, it is no defense that accused acted in ignorance of the minor's age and without any intent to violate the law." We adhere to the rule there announced, and the defendant's second contention is therefore overruled.

It is next contended that the court erred in refusing to give instruction No. 1, requested by the defendant, which reads as follows: "You are instructed that a sale of intoxicating liquor made by a servant without the express or implied authority of his master is not a sale by the master. And if you should find from the evidence in this case that a sale of liquor was made to a minor as alleged in the indictment by the servants of defendant Steinkuhler, and being against his express instructions, and not with his knowledge or consent and in violation of his orders, the defendant would not be responsible for such sale and your verdict should be not guilty."

The record discloses that the court was justified in refusing to give this instruction.

Instruction No. 11, given by the court on his own motion, reads as follows: "In the sale of intoxicating liquors to

Bankers Surety Co. v. Cross.

minors the owner or keeper of a saloon is responsible for the acts of his servants and employees, and a sale by an employee or bartender of a saloon-keeper is, in law, a sale made by the saloon-keeper himself, unless such sale is made in defendant's absence and in violation of his orders." This was followed by instruction No. 12, which reads: "If sales were made to any minors as alleged in the indictment by the defendant's bartenders, without defendant's authority and against his will, and contrary to his instructions, and when he was not present, such sales would not be the defendant's acts and he would not be responsible in a criminal prosecution for such sales. But whether instructions not to sell to minors were given by the defendant to his bartenders in good faith with the expectation that they would be obeyed and with the intention that they should operate as a limitation upon the authority of such bartenders to make sales to minors is a question for you to determine from the evidence."

The rules contained in the instructions just quoted were approved by this court in *Moore v. State*, 64 Neb. 557, and in *In re Lerger*, 84 Neb. 128. It thus appears that the instructions given by the court avoided the necessity of giving the requested instruction.

Having answered all of the defendant's assignments, and finding no reversible error in the record, the judgement of the district court is

AFFIRMED.

**BANKERS SURETY COMPANY, APPELLEE, v. JABEZ S. CROSS,
APPELLANT.**

FILED JUNE 23, 1916. No. 18957.

Indemnity: COUNSEL FEES. A saloon-keeper's surety which has procured from a third person indemnity against all suits, charges, and expenses, including costs and counsel fees, by reason of such

Bankers Surety Co. v. Cross.

suretyship, may recover from the indemnitor necessary counsel fees and expenses paid in defending an action on the saloon-keeper's bond against the principal and the surety, where the latter had reasonable cause to believe and did believe that such action on its part was necessary, though the principal had employed competent counsel to make a defense.

APPEAL from the district court for Douglas county: LEE S. ESTELLE, JUDGE. *Affirmed.*

I. J. Dunn, for appellant.

W. C. Fraser, contra.

ROSE, J.

This is an action by plaintiff, the Bankers Surety Company, to recover \$437.70 on a contract of indemnity executed by defendant. Plaintiff became surety on the bond of John R. Hauber, a saloon-keeper in Nebraska City, but, before doing so, procured from Jabez S. Cross, defendant, a contract in the penal sum of \$5,000, indemnifying plaintiff "against all suits, actions, debts, damages, demands, costs, charges, and expenses, including costs and counsel fees," by reason of plaintiff's suretyship. Subsequently Hauber and the Bankers Surety Company, surety on his bond, were sued for damages on account of the sale of intoxicating liquors. Hauber employed an attorney to defend the suit, and the surety company by its own attorney filed a separate answer and joined in the defense. After the trial had been commenced a compromise was effected. The present action was instituted to recover from Cross, the indemnitor, counsel fees, expenses and costs paid by the surety in defending the former action. The jury rendered a verdict in plaintiff's favor for \$381.12, and from judgment thereon defendant has appealed.

The indemnitor contends that the evidence is insufficient to sustain a verdict in favor of the saloon-keeper's surety, under the instructions of the court. The court instructed the jury that, if the surety had reasonable cause to believe that it would suffer loss unless it employed an attorney

Bankers Surety Co. v. Cross.

to assist in the defense, it would be entitled to recover the reasonable value of the attorney's fees and the amount of expenses and costs paid. It is insisted there is no proof that the surety had reason to believe that it was necessary to employ counsel in addition to that furnished by Hauber, the saloon-keeper. There was evidence tending to show that when the former action was commenced Hauber's attorney notified the surety of the suit. No answer was filed on behalf of the surety except by its own attorney. The surety's attorney conferred with Hauber's attorney in reference to the trial of the case and also interviewed the witnesses for the defense. Some of the necessary witnesses lived in Iowa and refused to attend the trial without payment of their fees in advance. Hauber refused to advance the fees, and his surety did so. The evidence seems to justify a finding in favor of the surety on this issue.

It is also contended that, since Hauber had employed counsel and since the indemnitor was financially responsible, the surety was not justified in employing additional counsel. The indemnity contract provided:

"If the above bounden J. S. Cross, his executors or administrators shall, at all times hereafter, save harmless and keep indemnified the said the Bankers Surety Company, its successors and assigns against all suits, actions, debts, damages, demands, costs, charges, and expenses, including court costs and counsel fees at law or in equity, and against all loss and damages whatever, that shall or may at any time hereafter happen or accrue to the said the Bankers Surety Company, its successors or assigns, for or by reason of the suretyship of the said the Bankers Surety Company, as aforesaid, then this obligation to be void and of no effect, otherwise to be and remain in full force and virtue in law."

The surety was a codefendant in the suit against Hauber on his bond. The indemnity contract was the obligation of Cross, the indemnitor, and not that of Hauber. It indemnifies the surety against all suits and against all loss and damages, including counsel fees and expenses.

Schminke v. Sinclair.

That Hauber had employed competent counsel did not necessarily prevent his surety from taking necessary steps to defend itself against liability in an action in which it was answerable as a codefendant. *American Surety Co. v. Vinsonhaler*, 92 Neb. 1, is relied upon by indemnitor, but that case is distinguishable. The language used in the opinion supports the position of the surety. In the opinion it was stated: "No doubt under this contract the surety ought to be protected against all necessary expenses incurred in defending itself against liability on these bonds, and should be allowed to exercise a reasonable discretion as to necessary measures of defense; but the allegations of this petition indicate that the expenses sued for were unnecessary, and there is no allegation of circumstances showing any necessity for such expense, or even that the surety regarded such expense necessary."

In the present case the evidence justified a finding that the surety believed, and had reasonable cause to believe, that the expenses incurred were necessary. The judgment is therefore

AFFIRMED.

SEDGWICK, J., not sitting.

**ANNA SCHMINKE, APPELLANT, V. DORA SINCLAIR ET AL.,
APPELLEES.**

FILED JUNE 23, 1916. No. 18967.

1. **WILLS: DEVISE: CONSTRUCTION.** While a limitation repugnant to a devise of the fee is void, a subsequent clause disposing of the property on the death of the devisee may be considered an indication of the testator's intent, by means of the previous clause, to devise a life estate only, where such previous clause does not clearly and unequivocally devise the fee.
2. ———: ———: ———. A devise to testator's widow "so long as she shall continue my widow and unmarried," the property, in the event of her marriage or death, to be divided equally among the testator's children, vests in the widow a life estate only.

APPEAL from the district court for Otoe county: JAMES T. BEGLEY, JUDGE. *Affirmed.*

George W. Berge and L. F. Jackson, for appellant.

Paul Jessen and Livingston & Heinke, contra.

ROSE, J.

This is an action for the construction of the will of Paul Schminke, who died in Otoe county, December 25, 1892. Plaintiff is his widow, and defendants are his heirs. The will provided:

"(1) I devise and bequeath all the estate and effects whatsoever and wheresoever, both real and personal, to which I may be entitled or which I may have power to dispose of at my decease unto my dear and beloved wife, Anna Schminke, so long as she shall continue my widow and unmarried; and in the event of her marriage or death I devise and bequeath the same to my children, to be divided between them as nearly as may be possible in equal shares, except as follows:

"(2) I devise and bequeath to each of my sons, D. William Schminke and Charles Schminke, an additional sum of one thousand (\$1,000) dollars in cash.

"(3) And to my daughters, Mrs. Dora Sinclair and Augusta Schminke, an additional sum of five hundred (\$500) dollars in cash to each of them."

From a judgment of the district court decreeing that plaintiff took a life estate only, she has appealed.

Plaintiff contends that the will vested in her a fee simple estate, subject to remarriage. She invokes the statute providing that every conveyance shall pass all the interest of the grantor therein unless a contrary intent appears. Rev. St. 1913, sec. 6192. She argues that the first clause devised a fee, subject to remarriage, and that the subsequent limitation was void as being repugnant to the fee. *Little v. Giles*, 25 Neb. 313.

The contention of plaintiff is answered in *Loosing v. Loosing*, 85 Neb. 66, 74, wherein it is said: "The intent

Schminke v. Sinclair.

of a testator must control, and will be ascertained from the language of the will aided somewhat by a consideration of the facts and circumstances surrounding the testator as reflected from the evidence, but that intent will not be inferred in flat contradiction to, and in violation of, well-established rules of law. We are committed to the principle that, if a testator in his will devises an estate in fee simple, a subsequent clause attempting to devise over any part of that estate is void. *Spencer v. Scovil*, 70 Neb. 87. We are satisfied with the principle stated in the cited case. The difficulty arises in applying the rule to the facts in the particular case. The rule does not of necessity apply merely for the reason that the first clause considered by itself might be construed as conveying a fee simple. The later clause, or clauses, may be read in connection with the first one for the purpose of advising the court whether it actually did transfer the fee, and if it does not in itself clearly and unequivocally do so, and by a comparison thereof with the remaining parts of the instrument the court is convinced that the testator did not in fact intend to vest the greater title in the first taker, the instrument will be construed accordingly."

The intention of the testator as expressed in his will as a whole was to give his widow an estate which should terminate in the event of her marriage or death. In other words, he intended that, upon her death, or sooner in case of her marriage, the estate should be divided equally among all of his children. The intention to give his children a share of his estate is manifest. General and equivocal words in the first part of the will which, standing alone, might vest the fee in plaintiff are to be considered as limited by the subsequent clauses evidencing an intent to devise only a life estate.

The judgment of the district court is therefore

AFFIRMED.

Whittier v. Riley.

WILLIAM E. WHITTIER, APPELLEE, v. LORRIN J. RILEY,
APPELLANT.

FILED JUNE 23, 1916. No. 18884.

Replevin: RIGHT OF ACTION. Where a contract of sale of a stock of merchandise provides that the seller shall retain possession of the stock until he has been paid from the sales thereof all above a stated sum, and that the purchaser shall take charge of and manage the business and out of the proceeds retain a sufficient sum to pay the actual running expenses of the business, and the profits on stock sold, over and above the invoice price plus 8 per cent. for freight, and the parties both enter into possession of the stock and business under such agreement, each party will be held to be in possession of the entire stock, jointly with the other, but for different purposes, the purchaser for the purpose of conducting the business and the seller for the purpose of protecting his security by taking the money received from sales under the terms of the contract until the stock has been reduced to the amount of the purchaser's stipulated interest; and replevin will not lie at the suit of either to disturb the possession of the other.

APPEAL from the district court for Dawson county:
HANSON M. GRIMES, JUDGE. *Reversed and dismissed.*

Hoagland & Hoagland and E. A. Cook, for appellant.

George C. Gillan and Munson & Munson, contra.

FAWCETT, J.

Plaintiff commenced this action in replevin in the district court for Dawson county, to recover possession of a stock of hardware and farm implements, then in the possession of defendant. Plaintiff prevailed, and defendant appeals.

On February 25, 1913, plaintiff and defendant entered into a written contract, by the terms of which defendant agreed to convey to plaintiff a tract of land in Phillips county, Colorado, for an agreed consideration of \$6,250, in addition to a trust deed, standing against the land, in

Whittier v. Riley.

the sum of \$3,750, which plaintiff assumed and agreed to pay. Plaintiff, in exchange for defendant's equity in the land, agreed to sell and transfer to defendant a stock of hardware, implements, etc., situated in two certain buildings in the city of Gothenburg, in this state. Defendant was to take the stock at wholesale cost plus 8 per cent. to be added for freight, and was also to take the fixtures at cost of the same to plaintiff. The contract recited that it was known to the parties that the stock would invoice more than \$6,250, and provided that plaintiff should keep and retain possession of the stock until enough had been sold to reduce the same, together with the fixtures, to \$6,250; that plaintiff, in retaining the receipts from sales until the stock was reduced, should allow defendant, out of the receipts, a sufficient amount to pay the actual running expenses of the business. The profits on stock sold, over and above the invoice price plus 8 per cent., were to belong to defendant. The stock was to be reduced by May 10. It was not reduced by that date, and the time was extended to May 17. The stock not having been sufficiently reduced by the latter date, a controversy between the parties arose, and each attempted to lock the other out of the building. Defendant gained possession; and on August 28 was ousted by injunction, which was subsequently set aside and defendant restored to possession. September 8, 1913, plaintiff obtained exclusive possession under the writ in the present action. After the contract was entered into, an inventory of the stock was taken; whereupon defendant executed and delivered to plaintiff a deed to the Colorado land, and took the management and control of the business at Gothenburg. Upon the trial the district court, by request of the parties, construed the contract. The construction made by the court appears in the record. By that construction, the court found the transaction to be as above stated, and further found: "Riley (defendant) is in possession to manage and run the business. He bears the running expenses and the rent of the building. As consideration for the expenses and

Whittier v. Riley.

rent, Riley gets the profit in all goods sold above invoice price and 8 per cent. added for freight. Whittier (plaintiff) is in possession of all the stock, as security for the difference between \$6,250 and the invoice value of the stock."

The evidence sustains the construction of the court that defendant was in possession to manage the business; that he was to bear the running expenses and the rent of the building; and that plaintiff was in possession as security for the difference between \$6,250 and the invoice value of the stock. It appears from the evidence that after the invoice was made defendant took charge of the business and thereafter conducted it in his name. The letter-heads and other stationery were in his name. New goods were purchased in his name and charged to his account. This being the status of the parties, could either maintain replevin against the other? We think not. Each party was in possession of the entire stock, jointly with the other, but for different purposes. Defendant was in possession for the purpose of conducting the business, and plaintiff for the purpose of protecting his security by taking the money received from sales, less the cost of conducting the business. Neither party had the right to disturb the possession of the other. Without pursuing the matter further, we think the court erred at the conclusion of the trial in not dismissing plaintiff's action, as it is clear, under the very wording of the contract itself, and still more so when taken in connection with the evidence, that if plaintiff is entitled to relief of any kind it is not by an action in replevin.

The judgment of the district court is reversed and plaintiff's action dismissed, all at plaintiff's costs.

REVERSED AND DISMISSED.

MORRISSEY, C. J., and SEDGWICK, J., not sitting.

LORRIN J. RILEY, APPELLEE AND CROSS-APPELLANT V.
WILLIAM E. WHITTIER, APPELLANT AND CROSS-APPELLEE.

FILED JUNE 23, 1916. No. 18934.

1. **Partition: PERSONAL PROPERTY.** A court of equity has jurisdiction to decree partition or, if necessary, a sale of personal property owned in unequal shares by two parties each of whom has a right of possession.
2. **Evidence examined, and held sufficient to sustain a suit for an accounting and for the partition of personal property.**

APPEAL from the district court for Dawson county:
HANSON M. GRIMES, JUDGE. *Affirmed as modified.*

George C. Gillan and T. E. Munson, for appellant.

E. A. Cook and Hoagland & Hoagland, contra.

FAWCETT, J.

From a decree of the district court for Dawson county, ordering a partition of the stock and fixtures of a hardware and implement business, in the city of Gothenburg, and stating an account of the interests of the parties therein, defendant appeals, and plaintiff presents a cross-appeal.

February 25, 1913, plaintiff and defendant entered into a contract whereby plaintiff sold to defendant a tract of land in Phillips county, Colorado, the consideration being \$6,250 and the assumption by defendant of a mortgage of \$3,750. The consideration of \$6,250 was to be paid by the transfer to plaintiff of defendant's stock of hardware and implements at Gothenburg. It was known at the time that the stock would invoice more than \$6,250, and it was provided that defendant should retain possession of the stock until it was reduced to \$6,250. Plaintiff was to conduct the business. Actual expenses were to be paid out of the receipts, but were not to be charged against defendant's share of the stock. It was also agreed that plaintiff should pay rent upon the building occupied by the

Riley v. Whittier.

stock from April 1, 1913. The stock was not reduced by May 10, 1913, as provided in the original agreement, and the time was extended to May 17, 1913. The stock not having been sufficiently reduced by that time, a controversy between the parties arose, and each attempted to lock the other out of the building. Plaintiff gained possession of the building, and on August 28, 1913, was ousted by injunction, which was subsequently set aside and plaintiff restored to possession. September 8, 1913, defendant obtained exclusive possession in an action of replevin and has since retained such possession. That action was appealed to this court, and, at the present sitting, the judgment was reversed and the action dismissed. *Whittier v. Riley*, ante, p. 104. June 18, 1914, plaintiff commenced this suit. The petition alleges the facts above narrated, sets out the contract, and prays the court to adjust the equities between the parties and partition the property. The trial court made findings as to the interest of each party, prescribed several methods by which the parties might adjust the matter between themselves, and decreed that, in the event of their failure to adopt any of such methods, J. M. Alexander, as referee, should make a division of the stock in accordance with the findings of the court.

The principal contention of defendant is that the petition does not state a cause of action. The argument is that the contract entered into February 25, 1913, constituted a chattel mortgage and not a partnership, and that partition of the personal property could not be had. From an inspection of the contract and a consideration of the object sought, it is evident that the parties did not intend to enter into the relationship of mortgagor and mortgagee. It is not now necessary to decide what is the correct name for the situation created by the contract. The relation is rather one of a common ownership, in disproportionate shares, of a mass of unlike and unequal property, each party having a right of possession of the whole. The stock originally invoiced \$15,169.90; \$11,479.89 at the commence-

Riley v. Whittier.

ment of the replevin action, and \$10,112.27 when the present suit was instituted. Joint possession as contemplated by the contract had proved unsatisfactory. Neither party was entitled to the exclusive possession of the property. Under these circumstances partition is a proper remedy. In *Pickering v. Moore*, 67 N. H. 533, 31 L. R. A. 698, it is said: "A tenant in common of personal as well as real property has a right to partition if partition is possible, and, if not, to a regulation of its use equivalent to partition or to a sale. Coke Lit. secs. 164b, 165a; *Stoughton v. Leigh*, 1 Taunt. (Eng.) 402, 411, 412; *Morrill v. Morrill*, 5 N. H. 134, 135; *Crowell v. Woodbury*, 52 N. H. 613. On partition he is entitled to no particular part of the property, but only to his due proportion in value and quality of the whole. When it consists of chattels differing in quality and value, an appraisal of the value and a consideration of the qualities of the several chattels are essential to an assignment to each of his just share. In this case, as in that of a single indivisible chattel, if the parties cannot agree upon the use, sale, or division, judicial intervention is necessary. Until an adjudication of their rights, neither can assert a title in severalty to any portion of the property." This is the general rule. *Smith v. Dunn*, 27 Ala. 315; *Godfrey v. White*, 60 Mich. 443; *Tinney v. Stebbins*, 28 Barb. (N. Y.) 290; *Neal v. Suber*, 56 S. Car. 298; 6 Pomeroy, Equity Jurisprudence, sec. 705; Freeman, Cotenancy and Partition (2d ed.) sec. 426.

Barr v. Lamaster, 48 Neb. 114, and *Phillips v. Dorris*, 56 Neb. 293, relied upon by defendant, relate to partition of real estate, and do not hold that a court of equity cannot, under any circumstances, decree partition of personal property.

Upon the cross-appeal plaintiff contends that the trial court erroneously charged plaintiff with items and credited defendant with other items. A review of the interests of the parties will be less complicated by a consideration of the matter from defendant's standpoint. In the first invoice in March, 1913, the fixtures and stock were appraised

Riley v. Whittler.

at \$15,169.90. The contract provided that defendant was to keep and retain possession of the stock until enough was sold to reduce the value of the remainder to \$6,250. Expenses were to be borne by plaintiff, and the business was to be conducted by him. It was further provided that defendant should "receive the difference between the invoice price of the said stock and fixtures and \$6,250." A fair construction of the contract is that defendant should receive the difference between the invoice value, \$15,169.90, and \$6,250, or \$8,919.90. In order to reduce the stock, auction sales were first held, but this practice was abandoned. It was necessary to purchase some additional stock to keep the trade. Most of the running expenses were paid out of the proceeds. Defendant, to September 8, 1913, the date of the commencement of the replevin action, had received \$2,704.01 out of the proceeds of sales. He had, however, out of his own money, paid obligations of plaintiff aggregating \$864.03, viz.: Judgments for goods furnished while the business was conducted in plaintiff's name, \$150.19; interest on the Colorado mortgage and delinquent taxes on the land, \$160.59; taxes on the stock of goods, plaintiff's share, \$68.25; rent owing to defendant for five months, \$485. He is entitled to deduct this sum from the amount received, leaving \$1,839.98, as the net sum received by him. His share of the stock, at the commencement of the replevin action, was therefore \$7,079.92. Other items of credit claimed by defendant are disallowed, since the payments were made out of the proceeds of goods sold, and not from the net proceeds with which he is charged. Costs of the replevin action are not allowed in this suit, but will follow the judgment in that action. At the commencement of the replevin action the stock invoiced \$11,479.89. Defendant's share was \$7,079.92. Plaintiff's share was \$4,399.97, less \$855.61, indebtedness for goods purchased by him, making his net share \$3,544.36. The book accounts outstanding at the commencement of the replevin action belonged to plaintiff, in addition to his share in the stock. The amount of this

Riley v. Whittier.

item seems to have been \$1,500, but it is not clear that all the accounts accrued after he took charge of the business in March, 1913, nor what part of the accounts he has collected. This item must therefore be left for ascertainment by the district court. At the commencement of the replevin action the stock was invoiced and was delivered to defendant and has been in his charge since that time. The invoice September 8, 1913, when defendant took charge, was \$11,479.89. At the commencement of the present suit the invoice was \$10,112.27. Unpaid accounts for goods purchased since March, 1913, amounted to \$1,009.35. At the commencement of this suit the net assets were \$9,102.92. Plaintiff's interest was \$3,544.36. Defendant's interest was \$5,558.56. The difference between the net assets when defendant took charge September 8, 1913, and June 18, 1914, the date of the commencement of this suit, was \$1,521.36. Defendant had charge of the property, conducted the business, and collected the proceeds of sales. The decrease in the net assets should be charged against him and not against plaintiff. The decrease of \$1,521.36 deducted from \$7,079.92, his interest September 8, 1913, leaves \$5,558.56, due him, and \$3,544.36, due plaintiff at the commencement of this suit.

Plaintiff complains because the trial court taxed the costs of the receivership proceedings against him. The receiver was appointed on his application, but was later discharged because he failed to furnish bond. The costs were properly taxed against him.

Both parties are to blame for the situation in which they now find themselves. We are unable to say which is the more in fault. That they cannot carry out their contract of February 25, 1913, is clear. It is therefore the duty of the court to settle the controversy. We concur in the holding of the district court that this is a proper case for partition, but the decree is modified in the following particulars:

The interest of plaintiff in the property in controversy, at the time of the commencement of this suit, is found to

Riley v. Whittier.

be \$3,544.36, and the interest of defendant on that date \$5,558.56. It is ordered and adjudged that, within 30 days from and after the filing of the mandate of this court in the district court, defendant pay to plaintiff the amount of plaintiff's interest as herein found, viz., the sum of \$3,544.36, with interest at the rate of 7 per cent. per annum from the date of the commencement of this suit; that upon such payment being made defendant's ownership and possession of the entire stock and fixtures shall stand quieted and confirmed in him, and all rights of plaintiff to the use of said building shall thereupon become and be terminated; that defendant shall pay all outstanding indebtedness for goods purchased, and shall also account to plaintiff for the book accounts outstanding at the time of the commencement of the replevin action; that, in the event of defendant's failure to make such payment to plaintiff within said time, the referee, appointed by the decree of the district court, shall take possession of said building, stock, and fixtures, and proceed to sell first the stock, and, if necessary, next the fixtures, under the direction of and in the manner which may be ordered by the district court, and apply the net proceeds arising from such sale to the payment to plaintiff of the said sum of \$3,544.36, with interest at 7 per cent. from the date of the commencement of this suit to the dates of the payment by such receiver of any amounts paid to plaintiff hereunder; that, when the full sum of \$3,544.36, with interest, shall have been paid to plaintiff, the residue and remainder of such stock, fixtures, and book accounts, after accounting to plaintiff for the book accounts outstanding at the commencement of the replevin action, shall be delivered to defendant and the receiver discharged. It is further ordered that all costs in this proceeding, except those taxed to plaintiff, as hereinbefore approved, shall be divided equally between the parties hereto, and be so taxed.

As herein modified, the judgment of the district court is affirmed.

AFFIRMED AS MODIFIED.

MORRISSEY, C. J., and SEDGWICK, J., not sitting.

Home Savings Bank v. Shallenberger.

HOME SAVINGS BANK OF FREMONT, APPELLEE, v. A. C. SHALLENBERGER, APPELLANT.

FILED JUNE 23, 1916. No. 19366.

Appeal: LAW OF THE CASE. When this court upon appeal determines the law of the case, the trial court is bound thereby, and its judgment accordingly will not under any ordinary conditions be disturbed upon another appeal.

APPEAL from the district court for Harlan county: HARRY S. DUNGAN, JUDGE. *Affirmed.*

• J. G. Thompson, Flansburg & Flansburg and John Ever-son, for appellant.

John L. Rice, *contra.*

SEDGWICK, J.

This is the third time this case has been before this court. 82 Neb. 507; 95 Neb. 593. Twice the case was submitted to the jury, and the jury found in favor of the defendant. Upon this last trial the court, supposing it was following our former decision in this case, instructed the jury to find for the plaintiff. The facts are sufficiently stated in the former opinions. The defendant has complicated the case somewhat by changing his position from time to time. He has filed at least four different answers.

The defendant now insists in the brief that there was sufficient evidence that Shelly-Rogers Company misrepresented matters to him when he signed the guaranty of payment of the note, so that that question should have been submitted to the jury. In the last of the former opinions in this case it was said that "the charge of fraud committed by the Shelly-Rogers Company was not sustained and it is unnecessary to inquire what effect proof of fraud on its part would have upon the rights of plaintiff." That is to say, Shelly-Rogers Company was offering to sell this note to the plaintiff bank, and the bank would

Home Savings Bank v. Shallenberger.

not take the note unless this defendant would continue to guarantee the payment. Therefore Shelly-Rogers Company procured the defendant to guarantee the payment, and the bank then took the note. The opinion holds that the guaranty is an absolute one, and that it goes with the note, so that an innocent purchaser of the note would take it with the guaranty, and would not be responsible for the manner in which some prior owner of the note had procured the defendant to guarantee the note. This, by the former opinions, has become the law of the case. If this case is ever going to be ended, it will have to be done by the court, since the questions are questions of the law of negotiable paper with which the jury is not supposed to be familiar. It is clear that this bank purchased this note in the regular course of business, without notice of any defense, and relying upon the guaranty of the defendant, and under the law of the case as settled in our former decision is entitled to recover.

The trial court followed our decision, and its judgment is

AFFIRMED.

LETTON, J., concurring.

I concur for the reason that even if, as the amended answer now pleads, defendant had been released as a guarantor of a former note by its extension without his consent, the additional extension of time granted to the maker of this note by reason of the execution of this guaranty is sufficient consideration to bind him, even though a stranger to the instrument.

MORRISSEY, C. J., dissenting.

This is the third time this case has been before the court. The first opinion is found in 82 Neb. 507, and the second in 95 Neb. 593. In 1901 defendant was in the banking business at Alma, Nebraska, and Shelly-Rogers Company was in the live stock commission business at South Omaha. Cattle belonging to the Shelly-Rogers Com-

Home Savings Bank v. Shallenberger.

pany were sold to one W. P. Summers through the agency of defendant and another. Summers was then living at Lamar, Nebraska. Summers executed a note in the sum of \$830, dated October 21, 1901, due June 6, 1902, in payment for the cattle, and also executed a chattel mortgage covering the cattle to secure the payment of the note. Defendant indorsed or guaranteed this note and delivered it to Shelly-Rogers Company. There was some profit or commission realized by defendant; the amount not being shown by the record.

The note was not paid at maturity, but a renewal note was taken June 6, 1902, falling due December, 1902. December 9, 1902, the original note and mortgage were surrendered and the mortgage released of record. December 16, 1902, Summers executed a renewal note and mortgage, which Shelly-Rogers Company sold to plaintiff, December 20, 1902, but with the promise, however, that they would procure the guaranty of defendant on said note. On the same day Shelly-Rogers Company wrote defendant, so he testifies, that Summers desired to make a renewal of the note which defendant had previously guaranteed; that they were willing to make the renewal provided he would sign the guaranty, which they inclosed, and which is set out at length in the former opinions. He also says they inclosed a slip giving a list of cattle covered by the mortgage which showed that the note was amply secured; that, relying on their statement, and believing that this was a renewal of the note dated October, 1901, on which he was liable as a guarantor, he signed the guaranty which is now in suit; that the note which he had guaranteed had been fully released and his liability thereon discharged in June, 1902; that the note taken in June, 1902, had also been renewed and the new note sold and delivered to plaintiff at the time they made these representations to him, but these facts were concealed, and he was induced to sign on the representation that the note which was being renewed was the one executed in October, 1901, and on which he was liable as indorser or guarantor; that he would not have

Home Savings Bank v. Shallenberger.

signed the guaranty had the truth not been concealed from him, and that there was no consideration for the guaranty which is in suit. On each of the other trials the jury found for defendant, but on the last trial the court directed a verdict for plaintiff, and defendant has appealed.

Appellee contends that all of the issues involved were determined by our former opinions in this case. The district court must have taken the same view; but appellant maintains that there were new issues raised by the amended answer, namely, that the signature to the guaranty was procured without consideration, by concealment of the true facts, and by falsely representing to him that he was guaranteeing the renewal of a note which he had once guaranteed, and on which he was then liable, and that his signature to this guaranty would work an extension or renewal of this old note, and that without this new guaranty this renewal would not be taken, while in truth and in fact the note which he had previously guaranteed had been surrendered, and his liability thereon had ceased; that this guaranty would not, and did not, procure the extension of time, or renewal of any note, but that this renewal had already been effected, that the new note had been given 14 days before, and had been sold and delivered to plaintiff 10 days before defendant executed the guaranty; and that "had defendant been advised of the actual state and condition of the said Summers note, he would have refused to sign said slip."

The correctness of the court's ruling depends on whether there was any question of fact, not previously determined, for the jury to determine from the evidence. The first opinion, so far as material here, reiterated the rule that "the extension of time of payment to a principal debtor is a sufficient consideration to support a new contract of guaranty made after the date of the renewal of such obligation, especially when the guarantor at the time of making such guaranty is still liable as guarantor for the payment of the debt renewed."

This was reiterated in the second opinion, and a number of other questions determined. The law laid down in these opinions is nowhere questioned on this appeal. On the last trial defendant by amended answer alleged, in substance, that this guaranty was procured by fraud. Defendant's testimony supports this allegation of the answer. It is true that there are many things in the record to raise an issue on this question. The answers filed on the former trials are incorporated in the bill of exceptions, the correspondence between the parties is shown, and excerpts from the briefs heretofore filed by appellant are set out in the brief of appellee. From these it is argued that defendant guaranteed the renewal note given by Summers in June, 1902, and was still liable thereon when he executed the guaranty in suit, in December of that year. This guaranty was mailed to defendant by Shelly-Rogers Company, but the letter accompanying it was not produced. Defendant testified that he did not guarantee the renewal note taken in June, 1902, and did not know that a new note was taken in June until the second trial of this case, and had no knowledge whatever that the note had been extended or that he had been released. There is testimony for the plaintiff showing that the defendant had guaranteed the note executed in June, and that his liability still existed. Indeed, there is a sharp conflict in the evidence on this question, and different minds may draw different conclusions therefrom. This is a question that has not been determined on either of the former trials, and is a material question of fact which ought to have been submitted to the jury.

The material questions presented were: (a) Had defendant already been released from liability on his original guaranty at the time he executed the guaranty in suit? and (b) was he induced to sign this guaranty by the false representations made by Shelly-Rogers Company at the time his signature was procured? On the record a verdict might be sustained for either party. Such being the case, it was error to instruct a verdict for the plaintiff. Defendant was entitled to have these questions submitted to the

Rookstool v. Cudahy Packing Co.

jury. They did not fall within "the law of the case," because they were then presented for the first time.

HAMER, J., dissenting.

As I understand it, the defense made in this case at the last trial in the district court had never been made before, and the district court was in no way bound either by the judgment of this court or by any rule of law or precedent. I think the judgment of the district court should be reversed, and I dissent from the majority opinion.

ORA ROOKSTOOL, APPELLANT, v. CUDAHY PACKING COMPANY
ET AL., APPELLEES.*

FILED JUNE 23, 1916. No. 18647.

Master and Servant: INJURY TO SERVANT: LIABILITY. If the employment of a child under the age of 14 years is the proximate cause of an injury to such child while in such employment, then the employer is liable in damages for the injury sustained.

APPEAL from the district court for Douglas county:
GEORGE A. DAY, JUDGE. *Reversed.*

Murphy & Winters, for appellant.

Gurley, Woodrough & Fitch, contra.

HAMER, J.

This action was brought in the district court for Douglas county by the plaintiff, Ora Rookstool, through his next friend, his mother, Lillian Sheets, to recover damages claimed to have been sustained by him while he was in the employment of the Cudahy Packing Company. He was in the hog-killing department of the packing plant operated at the time of the injury in South Omaha. The plaintiff was 13 years of age. On the 22d day of May, 1910,

*Judgment of district court affirmed on rehearing. See opinion, p.—, *post*.

Rookstool v. Cudahy Packing Co.

after he had finished his day's work, he was about to leave the packing house. He stood at the entrance of the elevator shaft, intending to board the elevator for the purpose of leaving the plant. To find out the position of the elevator he looked into the elevator shaft, and it suddenly descended and struck him on the back of the head, tearing the top of his scalp loose and knocking out his teeth.

The above facts were set up in the plaintiff's petition. In its answer the defendant admitted that the plaintiff was in their employ, and that he had received an injury by thrusting a part of his body into the elevator shaft, but charged that the injury was caused by the negligent act of the plaintiff in placing part of his body within the elevator shaft so that the same was struck. A jury was impaneled and the evidence was taken; and at the conclusion the defendant moved the court to direct a verdict in favor of the defendant or discharge the jury, and to enter judgment for the defendant. This motion was sustained by the court, and the jury were discharged, and the cause was dismissed at the cost of the plaintiff. There was a motion for a new trial, plaintiff claiming that the decision was not sustained by sufficient evidence, that it was contrary to law, and for errors of law occurring at the trial, and because the court erred in discharging the jury and in rendering judgment for the defendant.

The testimony of the plaintiff was to the effect that he was injured while working in the killing department, breaking jaws and trimming pigs' feet; that he had been working at the packing house about six months when he was hurt; that he had had no other packing house experience. On the day he was hurt, at about half past 5 o'clock in the afternoon, he went up to the dressing room and changed his clothes, and stopped by the elevator and stood there, and then looked into the elevator shaft to see where the elevator was. He had used this same elevator almost every day. It was his means of leaving the plant. Besides knocking his teeth loose, his scalp was peeled up over his head. He was in the hospital nearly three weeks. Dur-

Rookstool v. Cudahy Packing Co.

ing the time that he waited for the elevator and up to the time when he was struck there was no warning of any bell or gong, or warning of any kind. He had not been talked to about the danger of being around the elevator; he had not been warned against looking into the elevator shaft. While his head was in the elevator shaft down came the elevator from above. There was a bell on the floor where the plaintiff was, but the defendant did not ring it. The elevator was not supposed to move until the bell sounded.

The plaintiff testified: "No, sir; there wasn't no gong rang at all." It appears that no one instructed the plaintiff concerning the danger of being about the elevator. "Q. During the six weeks of your employment with the company, did any person, foreman, or subforeman say anything to you concerning the danger of being about and around the elevator? A. No, sir; they did not. Q. Did any foreman or subforeman caution you against looking into the elevator shaft? A. No, sir.

Clyde Hague, a witness for the plaintiff, testified that he worked in the same department with the plaintiff, and that he went with him to the elevator; that he never thought that the car would move without the bell rang beforehand.

The plaintiff's mother testified: "Ora was 13 years old, going to be 14 the 26th day of June, and he was hurt the 22d day of May. Q. What was his health prior to that injury? A. Why, he was a big, husky boy; he did a man's work; he was a lively boy and smart, and of course you can see the condition of him today." She further testified: "Well, since that injury, he is just sluggish, he can't work, that is all; he is a boy that can't work."

The defendant's motion for a directed verdict was based upon the contention that the plaintiff was guilty of contributory negligence, and that there was no negligence on the part of the defendant company. It is alleged that the court erred in holding that the defendant was not guilty of negligence. It is also alleged that the court erred in

Rookstool v. Cudahy Packing Co.

holding that the plaintiff was guilty of contributory negligence; also that the court erred in not sustaining the plaintiff's motion for a new trial; also that the court erred in sustaining defendant's motion for a directed verdict.

Under the statute, no child under the age of 14 years shall be employed, permitted or suffered to work in, or in connection with any theater, concert hall, mercantile institution, store, office, hotel, laundry, manufacturing establishment, bowling alley, passenger or freight elevators, factory or work shops, or as a messenger or driver therefor, within this state. Rev. St. 1913, sec. 3575 *et seq.*

Under section 3576, this inhibition as to the various employments mentioned in section 3575 is made to apply to children between 14 and 16 years of age, unless the person or corporation employing the child procures and keeps on file and accessible to the truant officers of the town or city, the state commissioner of labor, and his deputies. and the members of the state board of inspection, an employment certificate as prescribed by statute, and also keeps two complete lists of all such children employed therein, one on file and one conspicuously posted near the principal entrance of the building in which such children are employed.

If the employment of an infant under the age of 16 years, contrary to the provisions of the statute, is the direct cause of an injury to a child, his master is liable therefor.

In *Hankins v. Reimers*, 86 Neb. 307, it is held, as stated in the syllabus: "If the employment of an infant under the age of 16 years, contrary to the provisions of the statute, is the proximate cause of an injury to the child, his master is liable therefor." In that case it is stated in the petition that the deceased was under the age of 16 years at the time of his death; that he was ignorant of the dangers incident to the work in which he was employed, and that because of his immaturity he was incapable of appreciating the dangers attendant upon said work; that the defendant unlawfully, wrongfully and negligently directed said ser-

Rookstool v. Cudahy Packing Co.

vant to work in a cave where the work was dangerous to life and limb. In the body of the opinion it is said: "If an infant is injured as the proximate result of engaging at his master's request in a vocation which the legislature has forbidden an infant of that age to follow, the master is liable." This court cited with approval: *Lenahan v. Pittston Coal Mining Co.*, 218 Pa. St. 311; *Platte v. Southern Photo Material Co.*, 4 Ga. App. 159; *Starnes v. Albion Mfg. Co.*, 147 N. Car. 556; *Leathers v. Blackwell Durham Tobacco Co.*, 144 N. Car. 330.

It is competent for the legislature in the exercise of the police power to fix an age below which children may not lawfully be employed in dangerous occupations. *Lenahan v. Pittston Coal Mining Co.*, 218 Pa. St., 311; *Stehle v. Jaeger Automatic Machine Co.*, 220 Pa. St. 617; *Fortune v. Hall*, 122 App. Div. (N. Y.) 250, affirmed, 195 N. Y. 578; *Casteel v. Pittsburg Vitriified Paving & Building Brick Co.*, 83 Kan. 533; *Strafford v. Republic Iron & Steel Co.*, 238 Ill. 371, 128 Am. St. Rep. 129; *Inland Steel Co. v. Yedinak*, 172 Ind. 423, 139 Am. St. Rep. 389; *American Car & Foundry Co. v. Armentraut*, 214 Ill. 509; *Smith's Adm'r v. National Coal & Iron Co.*, 135 Ky. 671.

In a note to *Louisville, H. & St. L. R. Co. v. Lyons*, 155 Ky. 396, in 48 L. R. A. n. s. 667, where the cases are collected, upon the question of the defense of contributory negligence where the plaintiff was a minor employed contrary to a child labor statute, it is said: "As shown in the earlier notes upon the subject presented by the title to the present note, there is considerable conflict of opinion. The same conflict is also shown in the later cases, although it may be said that the view is apparently growing that neither contributory negligence nor assumption of risk can be relied upon by the master as a defense to an action for injuries to a child who is employed under the statutory age."

In the case cited it is said in the body of the opinion: "The child, in accepting employment, does not knowingly violate any law or purposely do any wrong, but the em-

Rookstool v. Cudahy Packing Co.

ployer does, and, between the two, the employer, for the benefit of the child, should bear all the burden, and the child none. In other words, the employer should be required, so far as compensation can do it, to put the child in the same condition as he would have been except for the wrongful employment which caused his injury. We therefore hold that neither the doctrine relating to assumed risk or fellow servants or contributory negligence has any place in the application of this statute. The employer takes all the risk, the child none. It is true this construction makes the employer an insurer of the safety of the child, and so he should be. The lives and limbs of children are too valuable to be sacrificed in dangerous employments, and if an employer, in violation of the statute, engages the services of a child in such an employment, he must see to it that no harm comes to him, or, if it does, he must compensate him, in so far as money can do, for the injury inflicted. * * * But the child labor statute prohibits the employment of children. It is unlawful to employ them, and the fact that it is unlawful to employ them is the reason why the employer who violates the statute should not be permitted to shield himself from his own wrong by setting up a defense that the child and not himself caused the accident. Except for his unlawful act in employing the child he could not have been injured, and the employer should not be permitted to take advantage of his own unlawful act by putting the consequences on an innocent party."

In the following cases it is held that, where a minor has been employed in violation of the statute, the master so employing him cannot rely upon assumption of risk as a defense. *Mueller v. Jordon Shoe Co.*, 143 Ill. App. 332; *Fortier v. The Fair*, 153 Ill. App. 200; *McNally v. Standard Railway Equipment Co.*, 165 Ill. App. 371; *Madden, Son & Co. v. Wilcox*, 174 Ind. 657; *Pinoza v. Northern Chair Co.*, 152 Wis. 473.

There is a contention in this case to the effect that plaintiff cannot rely upon the statute because the case was

Rookstool v. Cudahy Packing Co.

tried in the district court on the theory of a common law liability, and that the plaintiff cannot change his theory of the case. The petition alleged that the plaintiff was less than 15 years of age, and that, being a minor, he was not familiar with the dangers incident to the operation of said elevator and did not appreciate or understand the same, and did not know of the danger that might come to him by looking into the elevator shaft; that, according to the usage and custom covering the operation of said elevator, it was not to pass from an upper floor to a lower floor without first sounding an alarm or a gong warning persons that said elevator was about to approach from above; that said elevator was operated by defendant. The defendant's answer admitted plaintiff's employment and that he received the injury, and alleged that he carelessly and recklessly placed his body within the elevator shaft.

It appears that the plaintiff pleaded his age to be less than 15 years when injured, and his age was proved by him and also by his mother to be one month less than fourteen years. His employment is shown to have been in violation of the statute. It is also shown that he was not instructed concerning the danger attendant upon the use of an elevator. In the petition plaintiff alleges that he was a minor, and not familiar with the dangers incident to the operation of an elevator; that he did not appreciate the dangers belonging to the operation of said elevator, and did not understand or appreciate the specific charge of looking into the elevator shaft; that he was not warned concerning the same, and was not told of the danger of being caught by the descending elevator while looking into the shaft. There could have been no purpose in the allegation touching the plaintiff's age, except to show that his employment was forbidden by law. The same is true touching the testimony concerning his age. There could have been no purpose in the plaintiff pleading the fact that he was a minor, and that he was not familiar with the dangers incident to the operation of an elevator, except to

Rookstool v. Cudahy Packing Co.

show that he was a child and in danger because of his immaturity. Neither could there have been any purpose of procuring testimony touching his age, except to show that there was a violation of the statute. At this point it may be proper to state that there are two classes of children. The employment of those under 14 years of age is prohibited absolutely, while the employment of those between 14 and 16 years of age is not prohibited if certain restrictions are observed. The petition in this case alleges that the plaintiff was "less than 15 years of age," and the testimony shows that he was under 14. The section relating to the matter reads: "No child under the age of 16 years shall be employed in any work which by reason of the nature of the work, or place of performance, is dangerous to life or limb, or in which its health may be injured or its morals may be depraved." Rev. St. 1913, sec. 3587.

What was said by Judge Day about the boy putting his head in the elevator shaft shows that the district court held that the plaintiff should exercise the same care and prudence that would be required of a grown person. The district court seems to have overlooked the fact that the defendant's liability depended upon the wrongful employment of one whose age prohibited such employment.

The facts set up in the petition allege a liability because of the fact that the plaintiff was a minor and did not know and appreciate the dangers incident to the operation of the elevator in the packing house, or understand the danger of looking into the elevator shaft, and that he had not been warned or instructed by the defendant company concerning the matter; that he was caught between the floor of the descending elevator and the gate or guard rail over which he was leaning. It is also alleged in the petition that the plaintiff was engaged in the hog killing department at the time of his injury, and that he was less than 15 years of age. There appears to have been no objection to the testimony of the plaintiff and his mother that he was really less than 14 years of age.

Rookstool v. Cudahy Packing Co.

The plaintiff to maintain a case was bound to plead and prove facts tending to support a verdict and judgment and sufficient to sustain the same. When he shows that his employment was forbidden under the child labor statute, and that he was injured while engaged in such employment, and because of the same, he has shown enough to sustain a verdict and judgment. If these facts have been shown and a defective charge of negligence has also been made, and there is also insufficient proof to sustain it, the verdict and judgment must have stood anyway, if there had been a verdict and judgment based upon evidence, because they would rest upon the forbidden employment and the injury. But in this case facts are stated which tend to show that the defendant incurred a liability for negligence under the common law, and also a liability because the plaintiff's employment was forbidden under the child labor law by the sections of the statute referred to. The district court determined that there was no common law liability, but the judge did not undertake to determine whether there had been a violation of the child labor law. If the plaintiff had two reasons entitling him to recover, he was not obliged to rest upon one of them. If the reasons did not conflict with each other, then he had a right to stand on both of them. There was no motion to compel the plaintiff to elect. There was no submission of the facts concerning alleged negligence of the defendant in failing to ring the gong before the elevator started down. Of course, if the plaintiff was entitled to a verdict of the jury as to whether he was wrongfully employed by the defendant, there should have been a hearing before the jury on that question, and their verdict should have been taken, and judgment rendered upon it.

Upon the question of proximate cause, it is said in *De-Soto Coal Mining & Development Co. v. Hill*, 179 Ala. 186: "Nor is it necessary that injury must result as the proximate cause of some act or omission of the minor in the discharge of the duty assigned him, but the right of action arises if the injury resulted from the employment and was

Rookstool v. Cudahy Packing Co.

incident to any of the risks or dangers in and about the business. Of course, there would be no causal connection if the boy got sick or was injured in some way foreign to the master's work or business, although in or near the mine; but if the injuries are produced while the boy is at the forbidden place—that is, in or about a mine by some cause not foreign to the master's mine or business—there is such a causal connection with the forbidden employment as would render the master liable.”

In *Lenahan v. Pittston Coal Mining Co.*, 218 Pa. St. 311, it is said in the body of the opinion: “The exact question raised by this appeal is whether this common law rule was modified or changed by the statutory regulation. The injured boy was under 15 years of age, and if the appellee company employed him for the purpose of oiling machinery it did so in violation of the statute. Is it, therefore, in position to set up in this case the rule which presumes a boy over 14 to be capable of appreciating danger so as to apply the rule of contributory negligence to his acts, when the legislature in express terms provided that an employer shall not engage a person under the age of 15 years to perform this dangerous work? After full consideration we are unanimously of the opinion that the legislature, under its police power, could fix an age limit below which boys should not be employed, and, when the age limit was so fixed, an employer who violates the act by engaging a boy under the statutory age does so at his own risk, and, if the boy is injured while engaged in the performance of the prohibited duties for which he was employed, his employer will be liable in damages for injuries thus sustained. This rule is founded on the principle that when the legislature definitely established an age limit under which children should not be employed, as it had the power to do, the intention was to declare that a child, so employed, did not have the mature judgment, experience and discretion necessary to engage in that dangerous kind of work. A boy employed in violation of the statute is not chargeable

Rookstool v. Cudahy Packing Co.

with contributory negligence or with having assumed the risks of employment in such occupation."

In *Madden, Son & Co. v. Wilcox*, 174 Ind. 657, it was held, as stated in the syllabus: "Answers to interrogatories showing that the plaintiff was engaged to learn upholstering, that he was ordered to operate a towpicker, and that his hand became entangled in the machine, and he thereby sustained injuries, do not overthrow a general verdict for plaintiff, where the complaint alleged that the plaintiff, under 16 years of age, was incapable of appreciating the dangers of the machine, and that he was knowingly ordered outside the scope of his duties to operate such machine."

A right of action will lie against one who participates in the employment of the child, where the same is forbidden by law, and the employment is the proximate cause of the injury. *Marino v. Lehmaier*, 173 N. Y. 530, 61 L. R. A., 811; *Strafford v. Republican Iron & Steel Co.*, 238 Ill. 371, 20 L. R. A. n. s. 876.

It is a matter of common knowledge that boys are full of the activity of youth and not inclined to reflect very much. They cannot exercise control over themselves with certainty. In *Perry v. Tozer*, 90 Minn. 431, 101 Am. St. Rep. 416, the court held that proof of the violation of the statutory provisions in the employment of a boy or girl, followed by injury in such employment, makes a *prima facie* case for the recovery of damages, and that the plaintiff cannot be charged in such case with contributory negligence or with having assumed the risk of such injury.

Section 3575, Rev. St. 1913, prohibits the employment of any child under 14 years of age "in connection with any theater, concert hall, or place of amusement, or any place where intoxicating liquors are sold, or in any mercantile institution, store, office, hotel, laundry, manufacturing establishment, bowling alley, passenger or freight elevator, factory or workshop, or as a messenger or driver therefor." Section 3587, Rev. St. 1913, prohibits the employment of any child under 16 years of age in any work which by

Rookstool v. Cudahy Packing Co.

reason of its nature or place of performance is dangerous to life or limb, or in which its health may be injured, or its morals depraved.

If the defense of contributory negligence may be successfully interposed to defeat an action brought to recover damages because of the injury done to a child of tender years entitled to the protection of the statute on account of its age, then the action of the legislature becomes futile and the statute itself is rendered nugatory. Persons of immature years are incapable of properly appreciating the danger and of protecting themselves against it. The statute was made for the protection of such persons as the boy injured in this case.

"A concrete sewer located beneath the surface of a street is a 'structure' within Labor Law (Consolidated Laws, 1909, ch. 31) section 18, providing that a master engaging another to perform labor in the erection of a structure shall not furnish any unsafe stay or mechanical contrivance, and sheathing, shoring, and bracing used to hold back the earth out of the excavation are stays; a 'stay' meaning that which holds, restrains, or supports." *Armenti v. Brooklyn Union Gas Co.*, 142 N. Y. Supp. 420.

"In an action for the death of a servant killed by the caving in of an excavation for a sewer, the complaint, among other acts of negligence, charged that defendant failed to properly shore and support the excavation. *Held* that, while the complaint did not plead Labor Law (Consolidated Laws, ch. 31) section 18, providing that a master shall not furnish a servant engaged in the erection of a structure with any insufficient stay, yet as this is a general statute, which need not be pleaded, the complaint was sufficient to charge the master with liability thereunder; evidence that the caving in was caused by the insufficient stays being admissible." *Armenti v. Brooklyn Union Gas Co.*, 142 N. Y. Supp. 420.

"Where plaintiff is nonsuited at the close of his evidence, every question which can be fairly raised upon the record may be urged on appeal; the rule that a party cannot

Rookstool v. Cudahy Packing Co.

change his theory of action on appeal not applying." *Armenti v. Brooklyn Union Gas Co.*, 142 N. Y. Supp. 420.

In the body of the opinion it is said: "Finally, it is urged upon us that the complaint is not so framed as to charge defendant with liability under this statute, and that in the trial court no attempt was made to invoke its provisions. The complaint is certainly very general, and almost every conceivable ground of liability is asserted therein. But among other allegations of the cause of the subsidence from which the death of plaintiff's intestate resulted is 'that said defendants failed to properly shore, support, and secure the excavation and the ground contiguous thereto.' This is sufficient to allow the evidence that this was the physical cause of the 'cave-in.' If, when that fact is established, legal liability follows under the statute, the complaint cannot be successfully attacked for insufficiency; for the statute, being a general one, need not be pleaded. *Hagglad v. Brooklyn Heights R. Co.*, 117 App. Div. (N. Y.) 838, 102 N. Y. Supp. 1039. Nor is it fatal that this point was not called to the attention of the trial court. It may be that when a case has been submitted to a jury upon a particular theory it is too late for a plaintiff, who has been unsuccessful upon the issue tendered, to inject into the case on appeal another distinct element adding to the liability of the defendant, and which he has never been called upon to meet (*Rager v. Delaware, L. & W. R. Co.*, 64 App. Div. (N. Y.) 134, 71 N. Y. Supp. 851); but in the case of a nonsuit a different rule applies. 'Every question is open to the plaintiff which can fairly be raised upon the record.' "

In support of this last proposition the court cites: *Clemence v. City of Auburn*, 66 N. Y. 334; *Train v. Holland Purchase Ins. Co.*, 62 N. Y. 598; *Pratt v. Dwelling House Mutual Fire Ins. Co.*, 130 N. Y. 206.

In *Clemence v. City of Auburn*, *supra*, it is held, as stated in the syllabus: "A party to an action tried by jury, who has not, by treating the questions in the case as purely legal, and by acquiescence in their disposal by the court as such,

Rookstool v. Cudahy Packing Co.

assumed that there was no disputed question of fact for the jury, but who has been nonsuited upon the motion of his adversary over his objection and exception, may insist, upon appeal, not only that the judge at circuit erred in the application of the law to the facts as found by him, but that he erred in his conclusions of facts, or that there were disputed questions of fact which should have been submitted to the jury; he is not concluded by an omission to request the court to submit the whole case or any particular question of fact therein."

In *Train v. Holland Purchase Ins. Co.*, *supra*, it is held, as stated in the syllabus: "Where the court at circuit nonsuits plaintiff on the whole case, and an exception is taken, to enable him to present the exception to an appellate court for review, it is not necessary that he should ask permission to go to the jury upon the whole case or upon any question therein."

We think that the defendant is entitled to a jury trial upon the question of the violation of the statute. He is not barred upon the theory that only common law liability of the defendant may be considered. In reversing the judgment nonsuiting the plaintiff the defendant is not deprived of a jury trial. He may make a defense to such charge, and when the case is remanded he will have a full opportunity to present his theory. The case should have been presented to the jury upon the evidence under proper instructions. If the case ought to have been considered under section 3587, Rev. St. 1913, as also under the other sections above quoted, it was for the court to correctly construe the law and to instruct the jury so that a proper consideration of the facts might be made under the statute, and such a conclusion reached as the evidence warranted.

Counsel for the appellees make the contention that "the language of the act shows it was clearly the intention of our legislature to place the responsibility of inquiring into the age, physical and mental fitness of a child upon the officers and authorities provided for by law, and it also seems to have been the clear intention of the legislature

Rookstool v. Cudahy Packing Co.

that an employer having complied with the law in requiring a certificate has the right to reply upon same and assume the authorities and officers of the law have done their duty, and not take upon itself the duty to make further inquiry." It is time enough to discuss this question when it is fairly raised and the instructions of the court and the evidence require its solution by this court. Children under 14 years of age may not be employed in such a business because of the prohibition of the statute, but between 14 and 16 they may be employed if a proper certificate has been procured. Of course, the good faith touching the issuance of the certificate might not necessarily be disregarded by the court and jury. Perhaps we ought not to be unmindful of the struggles existing in the several states of the Union touching the employment of child labor and the protection of the young from physical, mental and moral injury.

The judgment of the district court is reversed and the case remanded for further proceedings.

REVERSED.

SEDGWICK, J., not sitting.

LETTON, J.

I concur in the reversal. Even if the presentation of a certificate such as is required by the statute in the case of children over 14 and under 16 years of age would excuse the employer or permit the defense of contributory negligence to be made, there is no competent or satisfactory proof in the record that such a certificate was ever procured, tendered to, or examined by the employer.

The principle applies that, if an employer takes a child in violation of a statute for his own profit, he should not be allowed to set up the defense that the child is guilty of contributory negligence. Careless conduct is to be expected of a child, and, but for the wrongful act of the employer in hiring him, he would not have been placed in the position of danger.

Under the statute and the evidence as it now stands, I am of opinion that contributory negligence is not a defense to the action.

LEWIS L. YOUNIE, APPELLANT, v. FRED SPECHT ET AL.,
APPELLEES.

FILED JULY 1, 1916. No. 18850.

OPINION on motion for rehearing of case reported in
99 Neb. 621. *Rehearing denied.*

PER CURIAM. Under the statute authorizing the district court to order service by publication after hearing the application of plaintiff showing that defendants cannot be found in this state, and that the residence and place of abode of such defendants are unknown to plaintiff and to his attorney, and that by reason thereof personal service cannot be had, an order for service by publication and a judgment based thereon are not void on the ground that the application did not state the nature of the action or that it was an action in which service by publication was authorized by statute. Rev. St. 1913, sec. 7640, subd. 6; section 7641.

REHEARING DENIED.

CHARLES WURDEMAN, APPELLANT, v. CITY OF COLUMBUS
ET AL., APPELLEES.

FILED JULY 1, 1916. No. 19508.

1. **Municipal Corporations: STREET IMPROVEMENTS: ESTIMATE OF COST.** In making an estimate of the cost of street pavement, a city engineer is not required to separately estimate the cost of each item going to make up the completed whole.
2. ———: ———: **CONTRACTS: COMPETITIVE BIDDING.** A contract for street pavement is not in violation of the statute relating to competitive bidding merely because it requires the use of a patented top coating.
3. ———: ———: ———: **DISCRETION.** The duty of city officers in awarding a contract for street paving is not merely ministerial, but partakes of a judicial character requiring the exercise of discretion.

APPEAL from the district court for Platte county:
GEORGE H. THOMAS and FREDERICK W. BUTTON, JUDGES.
Affirmed.

A. M. Post and C. N. McElfresh, for appellant.

Albert & Wagner, Reeder & Lightner and W. H. Bailey, contra.

MORRISSEY, C. J.

Plaintiff, a taxpayer within paving district No. 1 of the city of Columbus, brought this action to enjoin the officers of the city from proceeding under a paving contract entered into with a contractor for the laying of paving within the district, and from levying assessments against the property within the district, and from issuing, registering, or negotiating bonds for the purpose of meeting the expenses of the paving. There was a finding and judgment for defendants, and plaintiff has appealed.

Columbus is a city of more than 5,000 and less than 25,000 inhabitants, and the public improvement under con-

Wurdeman v. City of Columbus.

sideration falls within section 4887, Rev. St. 1913, requiring the city engineer to make estimates of the cost of labor and material when the amount thereof exceeds \$200, and submit the same to the city council, and that no contract shall be entered into for any work or improvement for any price exceeding the estimate, and, "in advertising for bids for any such work, the council shall cause the amount of such estimate to be published therewith," and also provides that "such advertisement shall be published at least ten days in some newspaper of general circulation published in the city."

The contract which plaintiff seeks to enjoin calls for the laying of bitulithic pavement. The plaintiff contends that this is without warrant under the statute, "for the reason that no estimate of the cost thereof was made by the city engineer." The engineer did in fact make and submit an estimate of the cost of bitulithic pavement, as well as a separate estimate of the cost of four other kinds of pavement, and bids were asked on each of these. True, he made no separate estimate of the cost of the different items required to make up the completed whole, but this is not required by the statute.

The statute does not require the estimate to be itemized so as to cover the probable cost of the different items to be used in the work. Its language is plain and simple, and the most that can be said of it is that it calls for an estimate of the gross expense. It does not matter so much to the property owner or taxpayer what the expense of each item entering into a given pavement may be, as it does what will be the sum total of its cost and the service it will render, nor does the statute provide by what method the engineer shall arrive at his estimate. There are a number of items to be taken into account in determining the probable cost of a job of paving. It is for the city engineer to make an estimate of the sum total of these items. The bidders will figure the items. One contractor may calculate the cost of grading at one price and another at a different price. One may figure the cost of material

Wurdeman v. City of Columbus.

at a different price from another, and so it is with each separate item of the improvement. The estimate fell within the provisions of the statute and error cannot be predicated upon the ruling of the court thereon.

This bitulithic pavement is patented, or at least the process by which it is manufactured is patented, and for that reason is controlled by one firm, Warren Brothers Company, of Boston, and, according to plaintiff's theory, competition for furnishing this kind of pavement was impossible, and therefore the contract is in violation of that section of the statute providing that contracts of this character shall be let to the lowest responsible bidder. There is a diversity of holdings among the courts. In the instant case, as in every other case that has been brought to our attention where this patented article was called for, the manufacturer stood ready and willing to deliver the article to all contractors at the same price. Attached to the plans and specifications was an offer by the patentee to furnish the bitulithic mixture, but the space left in the printed blank for the price at which it would be furnished had not been filled in, and the published invitation for bids did not contain a price stated from the patentee for this mixture. There is testimony that on the day of the letting inquiry was made of the city clerk regarding terms exacted by the patentee, and that the clerk informed the inquirers that the blank offer was the only paper received. It appears, however, that the patentee had in fact caused to be delivered to the clerk an offer, open to all bidders alike, agreeing to furnish the mixture at \$1.35 a cubic yard.

As was said in *Whitmore, Rauber & Vicinus v. Edgerton*, 149 N. Y. Supp. 508: "It must be understood that this bitulithic substance is merely a two-inch coating, or top dressing, and forms a very small portion of the entire pavement. The contractors were obliged to use bitulithic for this top dressing, but as to the remainder of the work—the excavations, foundations, curbing, gutters, catch-basins, and the large element of labor—there was no restriction of

Wurdeman v. City of Columbus.

any kind imposed in the specifications, and contractors had a right to purchase these other commodities wherever they chose, for there was nothing in the specifications which required them to get these materials from any particular contractor or manufacturer."

The patentees of the article are among the best-known manufacturers of paving materials in the United States. Its offer to sell to any successful bidder was on file with the city clerk, and, although the city clerk by inadvertence had mislaid the offer stating the definite price, the offer without the price stated was on file, and this was notice to all that the patentee stood ready to furnish the mixture. Any contractor desiring to bid might easily have ascertained the terms and price by communicating with the patentee, but the record fails to disclose any effort on the part of any person to do so. In due season the patentee sent to the mayor an offer to furnish the mixture with the price stated. The mayor delivered this offer to the city clerk, who carelessly mislaid it, but there is an utter absence of any showing that either fraud or favoritism entered into the letting of the contract.

Unless we are to hold that by the use of a patented process competition is forbidden, plaintiff's claim of error in this regard must be disregarded. While true that a number of courts hold that the use of a patented article makes competition impossible, yet we think the better reasoned cases hold that, where the patentee is ready and willing to furnish the mixture to all bidders alike, its use is not prohibitive of competition. "The fact that a street is directed to be paved with a patented article does not necessarily prevent competitive bidding." *Whitmore, Rauber & Vicinus v. Edgerton, supra*. In *Saunders v. City of Iowa City*, 134 Ia. 132, and in a note to *Johns v. City of Pendleton*, 46 L. R. A. n. s. 990 (66 Or. 182) may be found exhaustive discussions of this subject, but we refrain from quoting therefrom because it would run this opinion to an unnecessary length.

Plaintiff also claims that an excessive price was awarded as a result of a conspiracy, and he offered some testimony calculated to show that the price asked for the mixture is excessive, but the record discloses that this mixture, or compound, was open to all bidders at the same price, and that it entered into competition with four other and different kinds of pavement. While it is claimed by plaintiff that bitulithic pavement and asphaltic concrete pavement are substantially the same, an examination of the record shows there is a substantial difference between the two. Nothing on which to base a charge of conspiracy or design on the part of any one to favor any particular contractor is shown; but, on the other hand, it appears that the officers of the city exercise their honest judgment in the selection of the material to be used, and that the contract was awarded to the bidder submitting the lowest bid.

"In determining who is the lowest responsible bidder, or the lowest and best bidder, the duty of the board or officer is not merely ministerial, but partakes of a judicial character, requiring the exercise of discretion and judgment." 2 Dillon, *Municipal Corporations* (5th ed.) sec. 811.

As a concluding assignment of error, plaintiff says it was error on the part of the trial court to deny his request to amend his petition so as to allege the invalidity of the patent held by Warren Brothers Company. The court held that the issues tendered by the proposed amendment were immaterial and insufficient to constitute a cause of action. Surely the validity of this patent could not be tried in this action.

The record is found free from error, and the judgment is

AFFIRMED.

SEDWICK, J., concurring.

When the use of a patented article greatly increases the cost of an improvement, the officers and the property owners interested will not use such articles unless they are very certain that because of the superiority of the in-

Wurdeman v. City of Columbus.

provement the additional expense is money well invested. Undoubtedly it rests with them to determine that question, and not for the courts. I do not think that we ought to compel the property owners affected and the public officers to adopt our notions as to the advisability of using a patented article in paving their streets. It appears, however, that some of the bidders were not aware of the fact that this patented article could be obtained at a regular price uniform to all desiring to use it, and that competition was affected by that fact. Although the officers appear to have acted in good faith and without fraud, it is not so clear that the successful bidder did not get a larger price for the work than he could have obtained if the price he paid for the mixture had been known to all bidders and they had the unequivocal information that they could obtain the mixture at the same price. I am not satisfied that there must be positive evidence of fraud to invalidate this contract.

ROSE, J., dissenting.

Is the paving contract in controversy valid under a city charter declaring that the manner of procuring pavements shall be "by contract with the lowest responsible bidder?" Rev. St. 1913, sec. 4941. The purpose of the statute is to protect those upon whom the cost of paving falls. To this end competitive bidding is required. Can there be competitive bidding in good faith, within the meaning of the statute, where the greater part of the total expense of the completed pavement must be incurred for a patented article controlled by a monopoly? The contract requires "bitulithic pavement"—a patented article controlled by the patentee. The cost of the bitulithic material is more than half of the entire expense of the paving. The owners of the patented material offered to furnish it to all bidders at the rate of \$1.35 a square yard. This price is arbitrarily fixed by the patentee, and is not determined nor affected by competitive bidding among paving contractors. Other items, such as grading, curbing, concrete base, and

Marquis v. Polk County Telephone Co.

labor, may be subjects of competition, but their cost is only a minor part of the total expense. It seems to me the substantial competition demanded by the statute is defeated where the principal item entering into the contract price and representing the greater part of the total expense of the paving is patented and controlled by a monopoly. *Allen v. City of Milwaukee*, 128 Wis. 678, 5 L. R. A. n. s. 680; *Fineran v. Central Bitulithic Paving Co.*, 116 Ky. 495, 3 Am. & Eng. Ann. Cas. 741; *Pollock v. City of Kansas City*, 87 Kan. 205; *Siegel v. City of Chicago*, 223 Ill. 428. The courts deciding these cases took a view at variance with the majority in the present case and adopted a better rule. If defendants are dissatisfied with the city charter, the remedy is different legislation rather than judicial construction.

FAWCETT, J.

The courts of other states are hopelessly divided on the principal point involved in this case. The majority opinion follows one line of authorities and the dissenting opinion the other.

I think the cases cited by Judge Rose are based upon better reasoning and safer grounds than those relied upon in the majority opinion.

WILLIAM J. MARQUIS, APPELLANT, v. POLK COUNTY TELEPHONE COMPANY, APPELLEE.

FILED JULY 1, 1916. No. 19312.

1. **Municipal Corporations: PUBLIC UTILITIES: REGULATION OF RATES.** Unless expressly authorized and empowered by the legislature so to do, a municipal corporation has no power by contract to deprive the state of the right of regulation of rates of a public service corporation.

Marquis v. Polk County Telephone Co.

2. **Telephones: RATES: REGULATION.** A contract or agreement made in a franchise ordinance by which the maximum rates to be charged by a telephone company for the use of telephones by the inhabitants of the city are determined is made subject to the right of regulation.
2. ———: ———: ———. Since the adoption of the constitutional amendment creating the state railway commission and the passage of the law specifying the duties of said commission, that body has power to regulate the rates charged for the use of telephones in cities of the second class.
4. **State Railway Commission: DECISIONS: APPEAL.** The statute provides that, in appeals from the decision of the railway commission in the matter of rates or charges, such a decision is *prima facie* evidence that the rates fixed are just and reasonable, and such rates shall remain until annulled, modified or revised by the commission, or until finally adjudged to be unreasonable and unjust in a court of competent jurisdiction. Sections 6128, 6139, Rev. St. 1913.
5. **Telephones: RATES.** Evidence examined, and *held*, that the rate of \$2.50 a month allowed by the state railway commission to be charged for the use of a telephone for business purposes in the city of Stromsburg has not been shown to be unreasonable and unjust.

APPEAL from the State Railway Commission. *Affirmed.*

V. E. Wilson, for appellant.

King, Bittner & Campbell and Mills & Beebe, *contra.*

LETTON, J.

This is an appeal from a ruling and order of the state railway commission.

In 1902 the city of Stromsburg passed an ordinance granting a right of way to the Golden Rod Telephone Company and its assigns through the streets of that city for telephone and telegraph purposes, and it was further provided "that the real value or use of any telephone in any public office or place of business in said city shall not at any time exceed the sum of one and 50/100 (\$1.50) dollars per month, or in any private dwelling-house the sum of one (\$1.00) dollar per month, and that the city

Marquis v. Polk County Telephone Co.

of Stromsburg, Nebraska, shall have the use of three telephones, during the life of this ordinance, free of rental charge or any charge whatever." It was also provided that the telephone company "shall at all times permit their poles to be used for the purpose of placing and maintaining thereon any wires which may be necessary for the use of the police or fire department for the use of the city." The defendant is the successor and assignee of the Golden Rod Telephone Company. The complainant is the user of a business telephone. He charges that on April 1, 1913, without the consent of the city of Stromsburg, the respondent arbitrarily increased the charge made by it for the use of business telephones to the sum of \$2.50 a month.

For a second cause of action, it is alleged that the respondent's charge for a residence telephone is \$1 a month in the city and \$1 a month for the farm lines; that the service is poor and defective; that the charges for the use of a business telephone are unreasonable, unjust, excessive and discriminatory, and that a just and reasonable charge for the business telephones is not more than \$1.50 a month. Respondent pleads the adoption of the constitutional amendment creating the state railway commission; that the rates of which complaint is made were filed with and approved by that body; it denies that the lines, equipment or service are faulty; and alleges that the rate of \$1.50 a month for a business telephone is insufficient to justify carrying on the business; that to have continued to carry on the business at such rate would have bankrupted the defendant; and that \$2.50 a month is a fair charge.

The railway commission, after a hearing, dismissed the complaint, but made certain orders as to maintenance and repairs, the validity of which is not in issue.

Complainant admits that the city of Stromsburg had no express authority from the state to grant a franchise or to enter into an agreement fixing telephone rates, but he contends that the city had implied power to do so by reason of its ownership and control of the streets, alleys and public grounds, and by reason of power to contract conferred

Marquis v. Polk County Telephone Co.

upon it by statute. In the ordinance granting the franchise, the city contracted in its own behalf for the use of the poles of the grantee for carrying wires of the city for fire and police purposes, and also contracted for its free use of certain telephones. These considerations moved directly to the city. The real question is whether the city had power to contract in behalf of telephone users in such a manner that the right of regulation at that time inherent in the legislature was taken away. Unless the legislature by its own act specifically parted with the power to regulate and conferred it upon the municipal corporation in direct terms, such a power could not exist in the city, and whatever contract or agreement was made between it and the telephone company in behalf of telephone users within its limits was, and must necessarily have been, made subject to the legislative right of regulation. Indeed, to hold that an implied power to contract exists from the right to control the streets, and that contracts so made might not be impaired, might prove exceedingly detrimental to the public welfare. The progress of invention in the cheapening of processes has been so startling in recent years that a rate which is fair to both parties now may, in the case of gas, electric light, power, transportation, or like companies, yield in a few years an excessive profit on the capital invested. In such a case, the public might be powerless to impair the obligation of the contract.

The courts, therefore, will not hold that the exclusive power to contract exists unless plainly and expressly granted. *State v. Wyandotte County Gas Co.*, 88 Kan. 165, affirmed on error to the supreme court of the United States under the title, *Wyandotte County Gas Co. v. State of Kansas*, 231 U. S. 622; *Home Telephone & Telegraph Co. v. City of Los Angeles*, 211 U. S. 265; *Benwood v. Public Service Commission*, 75 W. Va. 127, L. R. A. 1915C, 261, and note, p. 264; *Milwaukee Electric Ry. & Light Co. v. Railroad Commission*, 153 Wis. 592; *City of Kenosha v. Kenosha Home Telephone Co.*, 149 Wis. 338.

This court has held in a number of cases that contracts made by public service corporations are made with the right of regulation as a part of the contract, and that the power to lower excessive rates or to increase inadequate rates still rested solely in the legislature until by virtue of the constitutional amendment the same power was extended to the state railway commission. *McCook Irrigation & Water Power Co. v. Burtless*, 98 Neb. 141, and cases cited. The fact that at the time the franchise ordinance in question was passed the railway commission was not in existence is not material. That body was given power to regulate the rates of common carriers, and by section 6124, Rev. St. 1913, the term "common carrier" is expressly made to include telephone companies.

There is a distinction between the cases cited by the complainant and the conditions here. In some of these cases there were constitutional or statutory provisions which were controlling, in others the contract provisions of the franchises under consideration did not relate to the fixing of rates. But, even if these authorities were to the contrary, we believe that the reasoning of the cases cited is more persuasive.

It is next contended that the commission erred in requiring the complainant to assume the burden of proof; in fixing too great an amount as the present value of the property of respondent; in fixing too great an amount which the telephone company is permitted to earn in the future for the purpose of maintenance and depreciation and for dividends, and in finding that the new rate does not discriminate unjustly against the users of business telephones.

Section 6128, Rev. St. 1913, provides that, in any appeal prosecuted from a decision in which the charges of a common carrier are involved, such decision shall be received in any appeal "as *prima facie* evidence that the rates therein fixed are just and reasonable." By section 6139, Rev. St. 1913, it is provided that the order of the commission "shall be in force and effect from and after

Marquis v. Polk County Telephone Co.

the date fixed by the commission and shall so remain until annulled, modified or revised by the commission, or until finally adjudged to be *unreasonable and unjust* in a court of competent jurisdiction." We must consider these complaints bearing in mind these legislative directions.

So far as the record shows, the complainant voluntarily assumed the burden of producing evidence to support the allegations of his complaint. His brief states that "he was required to open the hearing," but he has pointed out no such order or a request for a different order of proceedings, and we have found none in the record.

With respect to the value placed upon the property by the commission, a physical examination of the property was made by an expert in the service of the commission, and its books and accounts were likewise examined by the expert accountant of the commission. The value fixed by the commission is placed at the sum of \$79,925. To obtain this result, the commission took into consideration the amount of money put into the plant by the Golden Rod Company, the purchase price paid for it by the respondent, the fact that services were performed for some time in the organization and engineering for which no compensation in excess of \$1,000 had been paid, the amount of money borrowed, stock issued in lieu of cash dividends, the money having been actually used in the construction of the physical property, as well as other items. By this valuation, the average cost of each subscriber's station is something less than \$60. After considering all the evidence and the principles of law which have been laid down by the courts in the valuation of public service corporations, we are satisfied that this is not an unreasonable value. While no fixed standard of valuation has yet been evolved by the courts and each case must be determined upon its own facts, there are certain general principles which have been deduced. One of the latest expressions is that made by Mr. Justice Hughes, writing the opinion of the United States supreme court in *Simpson v. Shepard*, 230 U. S.

352, 434. He says: "The basis of calculation is the 'fair value of the property' used for the convenience of the public. *Smyth v. Ames*, 169 U. S. 466, 546. Or as it was put in *San Diego Land & Town Co. v. National City*, 174 U. S. 739. 'What the company is entitled to demand, in order that it may have just compensation, is a fair return upon the reasonable value of the property at the time it is being used for the public.'" See, also, *San Diego Land & Town Co. v. Jasper*, 189 U. S. 439; *Willcox v. Consolidated Gas Co.* 212 U. S. 19, 15 Am. & Eng. Ann. Cas. 1034.

The ascertainment of that value is not controlled by artificial rules. It is not a matter of formulas, but there must be a reasonable judgment, having its basis in a proper consideration of all relevant facts. The scope of the inquiry was thus broadly described in *Smyth v. Ames*, 169 U. S. 466, 546: "In order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth."

It is impossible within the limits of this opinion to set forth at length the history of the construction and operation of the respondent's system or the details of its property. It was shown that owing to the facts that the system of bookkeeping formerly used was defective in detail, that no charge was made for much of the organization and engineering work, and for other reasons it was

Marquis v. Polk County Telephone Co.

difficult to arrive at the actual cost of the property. It has not been claimed that any false or padded accounts have been kept. Taking the valuation of the engineer, the expenditures admitted by the complainant and all of the facts in evidence, we think that, though there is room for a difference of opinion as to the present value, the amount named by the commission is not unreasonable.

Did the commission allow too high a rate for depreciation and maintenance? The opinion of the commission recites: "The physical condition of the property is below standard requirements and considerable reconstruction is necessary. This condition, however, is not due entirely to the lack of revenue, as consideration must be given to the amount of money distributed to the stockholders in the way of dividends. It is apparent that a greater amount has been taken from the earnings for this purpose than was warranted by the requirements for a reasonable return." Continuing, it is said that when the company began its operations a strong competitor was already in the field. Keen competition resulted here as elsewhere in Nebraska, and the investment was in reality hazardous. That since dividends were paid in excess of the actual earnings, if a proper allowance had been made for maintenance, this necessitates the reduction of dividends until the plant is placed in a normal condition, and 10 per cent. of the cost of the property is ordered to be set aside annually for that purpose. It is also stated that the income is now less than formerly, and that even if the property had been kept up, the revenue derived under the former rate would not be sufficient to furnish a fair return. The excess amount retained to restore the plant is to be obtained, not by overcharging the telephone user, but by reducing dividends until the cost of this work has been paid. The evidence seems to bear out these conclusions. The expert for the commission testifies from the result of his investigations that the depreciation for the 110 months during which the plant has been in operation amounted annually to about 6 per cent., but that if the patrons of the company

Marquis v. Polk County Telephone Co.

desire service fully up with modern requirements it should be estimated in the future at about 9 per cent., and that in any event the depreciation is apt to be greater in the future on account of the age of the property; that the present plant is obsolete and good telephone service cannot be had until the present system is changed to a common battery system. There are only 127 business telephones to which the increased rate applies, and the annual revenue derived from the entire number of business telephones is \$1,524. Deducting this amount from the present revenue and allowing 10 per cent. for maintenance and depreciation, not more than 4 per cent. would now be available for dividends. This places the increased outlay to restore the plant on the stockholder, where it properly belongs.

As to the claim of unjust discrimination between rates charged for business telephones, and for residence and farm lines, it is difficult to establish a criterion as to a proper difference in rates. It is apparent that the number of calls which an operator at the switchboard will have to answer for a business telephone will ordinarily largely exceed the number of calls for a residence telephone and the cost of operation thus be increased. It would be exceedingly difficult, however, to ascertain the actual facts in this connection. The custom of telephone companies generally is to charge a greater amount for such telephones, and this custom seems to have been universally acquiesced in and not found unreasonable. The complainant has furnished no evidence tending to show that the difference in the rate charged by the respondent is unreasonable, unjust or excessive as compared with that charged for other telephones.

To conclude, it has not been shown that the rate established by the commission, which is *prima facie* valid and reasonable, is unreasonable and unjust. If experience demonstrates that the rate is excessive, the books of the corporation, now required by the commission to be kept in a more accurate and fact-disclosing method, will readily

Peterson v. Anderson.

furnish evidence of unusual profits or exorbitant charges, and in such case any person injuriously affected, including complainant if he is in that class, may apply for a reduction of rates.

The finding and order of the state railway commission are not found to be unreasonable and unjust, and are therefore,

AFFIRMED.

MORRISSEY, C. J., not sitting.

OSCAR PETERSON ET AL., APPELLANTS, V. CLARENCE M.
ANDERSON ET AL., APPELLEES.

FILED JULY 1, 1916. No. 19546.

1. **Schools: COUNTY HIGH SCHOOL: DE FACTO BOARD: TAX LEVY.** Two *ex officio* members of the board of regents of a county high school appointed a third member to fill a vacancy, afterwards the three members acting as a board filled the other two vacancies. *Held*, that the three members acting together constituted a *de facto* board. Their action in filling the vacancy was valid. An estimate made by the full board furnished sufficient authority for the county board to levy a tax for the support of a county high school.
2. ———: **TAXATION: ESTIMATE.** The fact that the estimate made by the board was communicated in a somewhat informal manner to the county board is a mere irregularity and is not a jurisdictional defect. *State v. Wise*, 12 Neb. 313.
3. **Taxation: LEVY.** A tax levy, otherwise valid, is not void for want of jurisdiction where it is shown that it was levied at the proper time and place by the majority of the county board, even though the record erroneously recites that it was made by the board of equalization.
4. **High Schools: ESTABLISHMENT: STATUTORY PROVISIONS.** Chapter 252, Laws 1913, was not repealed either directly or by implication by the passage of chapter 120, Laws 1915.

Peterson v. Anderson.

5. **Taxation: CONSTITUTIONAL PROVISION: COUNTY HIGH SCHOOLS.** The constitutional inhibition against county authorities assessing taxes, the aggregate of which shall exceed \$1.50 per \$100 valuation, does not apply to taxes levied for county high school purposes; the county high school district being a separate and distinct entity.
6. **Statutes: VALIDITY.** A provision for the free tuition of all pupils in the county cannot be enforced so far as it applies to pupils residing in districts which bear no part of the burden of taxation for the support of the county high school; but this provision was not the inducement to the passage of the act, and can be omitted without interfering with its purpose, namely, the furnishing of means to obtain an education sufficient to prepare students to enter the state university without compelling them to leave the county of their residence.
7. **Taxation: INJUNCTION.** Unless a tax is levied for an illegal or unauthorized purpose, its collection cannot be stayed by injunction.

APPEAL from the district court for Rock county: ROBERT R. DICKSON, JUDGE. *Affirmed.*

A. A. McLaughlin and J. A. Douglas, for appellants.

H. J. Miller and George W. Ayres, contra.

LETTON, J.

The plaintiffs, who are taxpayers of Rock county, bring this action for themselves and all others similarly situated. The purpose of the action is to restrain the county of Rock and its treasurer from collecting or attempting to collect any portion of a three-mill tax levied by the county board for the support of a county high school in that county.

It appears that the county board of that county, acting under the authority of the statute applying to counties not having organized within their boundaries a twelfth grade high school accredited to the state university, called a meeting of the directors of the various school districts in the county to elect three members of the board of regents of the county high school. The directors met at the time specified, June 25, 1915, but failed to elect, and adjourned the meeting until September 20, 1915. On July

12, 1915, the county treasurer and county superintendent of public instruction, who are by virtue of the statute *ex officio* members of the board of regents of a county high school, under the written advice and direction of the state superintendent of public instruction, appointed a member to fill one of the vacancies, and on the next day, the three acting as the board of regents, appointed two other members to fill the board. In August the board as thus constituted let contracts for the purchase of supplies, employed teachers, and afterwards caused a high school to be opened which has been attended by 50 pupils. A detailed estimate of the funds necessary for school purposes was made by this body, and in accordance with a request communicated to the county board by the secretary on the 18th day of August, the last day of its sitting as a board of equalization, the board of equalization, as the record shows, levied the three-mill tax recommended, which was spread upon the tax books and its collection begun.

This action was begun on November 29, 1915. The district court found that the equities of the case were with the defendants and dismissed the action.

It is admitted in the record that on June 26, 1915, there was no high school in Rock county accredited to the state university, and that when the law of 1915 was adopted there were only ten counties in the state which did not have a twelfth grade high school. It is also admitted that the three-mill levy for a county high school was not spread upon the tax list covering property in school district No. 18, which is the school district of Newport. It is shown that a high school of eleven grades was in existence in that district at that time; that a county high school has been maintained in Bassett since September 20, 1915; that indebtedness has been incurred; that 50 pupils are enrolled and 49 in attendance; that no suit was brought to restrain the action of the board of regents nor to restrain the collection of the levy until this action was begun, though a taxpayer protested to the board at the time of the levy. No protest was ever made to the board of regents

with respect to letting of contracts, the hiring of teachers, or expenditure of money. It is also admitted that the plaintiff, the Chicago & North Western Railway Company, had no notice of any of these proceedings until September, 1915, and that the notice then came to them from an independent taxpayer of that county.

It is contended that there was no board of regents having power to act. Acting under the advice and direction of the state superintendent, a third member was appointed by two *ex officio* members, and the three acting as the board of regents filled the vacancies. When the three members assumed to act under the authority of the statutes as construed by the state superintendent, and did act, they constituted at least a *de facto* board and had the power to fill the vacancies. *Bishop v. Fuller*, 78 Neb. 259. There was therefore a qualified board of regents existing which had power to act and make an estimate of expenses. The fact that the estimate made by the board was communicated in a somewhat informal manner to the county board is a mere irregularity and is not a jurisdictional defect. *State v. Wise*, 12 Neb. 313.

So also as to the complaint that the tax was levied by the board of equalization. It is shown that the levy was made by a majority of the members of the county board. The fact that from a misunderstanding of the statute the county assessor and the county clerk also took part in the proceedings should not vitiate the levy. The statute (Rev. St. 1913, sec. 6456) provides: "The county board of equalization shall adjourn from time to time until the action of the state board of equalization and assessment shall have been had and certified to the county clerk, and, on the last day of sitting as a board of equalization, the county board shall levy the necessary taxes for the current year, including all * * * school district * * * taxes required by law to be certified to the county clerk and levied by the county board." The language of this section is peculiar and is enough to mislead the county board into the idea that the levy must be made by the county board

while sitting as a board of equalization, especially since the two bodies were identical until by the new revenue law the county assessor and the county clerk were added to the board. The mere fact that the record of the county board shows that the levy was made when the board was sitting as a board of equalization is an irregularity which does not vitiate the tax nor afford ground for an injunction.

To determine the next point presented requires a statement of the legislation pertaining to county high schools. In 1907 the legislature passed an act (Laws 1907, ch. 122) the purpose of which was to permit the establishment of county high schools. The act applied to all counties in the state, and the establishment of the school depended upon a petition to the county board and the result of an election called to determine whether a county high school should be established. In 1911, 1913 and 1915 this law was amended. In 1913 an independent act was also passed entitled "An act to provide for the organization of county high schools in *counties not having a twelfth grade high school.*" Laws 1913, ch. 252. This act provided: "The county board of any county in this state that does not have organized within the borders of such county a twelfth grade high school accredited to the state university, shall be deemed authorized and it shall become their duty on the first Monday of June to call a meeting of all the directors of the several school districts in the county to meet at the county seat to elect a board of regents, in accordance with the provisions of law governing boards of regents for county high schools, and which provisions shall apply to a school organized by the county commissioners or supervisors the same as if organized as now provided for by law. The county high school herein provided for by law shall be located at the county seat of such county." The provisions of the former act relating to the organization of county high schools established by petition were thus adopted and carried forward into the new act. In 1915 an act (Laws 1915, ch.120) was passed amending sections 6819, 6833, Rev. St. 1913, and also repealing sections 6820, 6821 and

6834. The first section of this act purports to amend the first section of the 1907 act by making the establishment of a county high school mandatory in counties in which "there is not now located a twelfth grade high school accredited the state university," and the second section pertains to the right to vote bonds of the district. The sections repealed related to the holding of an election, the declaration of the result by the county board, and the right to vote on the site for the school. None of these sections includes the act of 1913, and no reference to that act is made. The act of 1915 does not repeal the act of 1913 by implication since its provisions are not inconsistent therewith; and, even if void for the reasons asserted by plaintiffs (which we do not decide), it affords them no aid in invalidating the tax levy.

It is also contended that the tax exceeds the constitutional limitation which prohibits county authorities from assessing taxes the aggregate of which shall exceed \$1.50 per \$100 valuation. We think the objection is not tenable. The county high school district is a separate corporation, and the tax levied is not assessed and levied for county purposes, but by the county board acting for the high school district.

It is said the statute permits the exclusion from the tax levy of any district which certifies to the board of regents on or before the 15th day of June of each year that a course of study beyond eight grades has been prescribed for the school for the ensuing year, and provides that tuition shall be free to all pupils residing in the county, and therefore that the tax is not uniform, but discriminates in favor of the taxpayers of such a district and against those outside of its boundaries and is void. While the means to attain the object are not felicitous, the effect of the provision is the same as if the legislature had in so many words declared that all portions of a county outside the limits of school districts in which "a course of study beyond the first eight grades has been prescribed for the school for the ensuing year" shall constitute a high

school district. There can be no question of its power to make such a distinction. The trouble is with the provision that any such district shall not be taxed if its officers so certify in any year on or before the 15th day of June. Is there any constitutional inhibition against allowing a district to separate from the county high school district by increasing its course of study and so certifying? We think not. The method may be clumsy, but it is not for the court to set it aside. With respect to the provision for free tuition of all pupils in the county, we are satisfied this provision cannot be enforced so far as it applies to pupils residing in districts which bear no part of the burden of taxation for the support of the county high school. *High School District v. Lancaster County*, 60 Neb. 147. But this defect is a minor one. It could not have been the inducement to the passage of the act and can be so construed without interfering with the purpose of the act, viz., the furnishing of means to obtain a high school education sufficient to prepare students for entrance to the state university without compelling them to leave the county of their residence. The purpose of the act is laudable, and the court should not lightly set it aside if by any reasonable means it can be so construed as to uphold its validity. Furthermore, there is nothing in the record to show that any pupil from the omitted district has attended the county high school, or that any portion of the taxes levied against the plaintiff or any other taxpayer in the county had been or will be devoted to the education of any pupil from that district. It is a well-established rule that no one can complain that a statute is unconstitutional unless he is injuriously affected thereby, and that the courts will not set aside a law as violative of the Constitution for the reason that there is a possibility that one's interest may be injuriously affected in the future.

It is argued that a county high school has never been established by the board of county commissioners; that the board has made no finding that a twelfth grade high

Peterson v. Anderson.

school accredited to the state university was not organized within the boundaries of the county, and that, prior to the levy, school district No. 18 of the county had organized such a high school which is now being maintained and was in process of organization at and prior to June 26. We are of opinion that the legislature established a high school district, and not the board; that when the fact was patent to all it was unnecessary for a formal finding to be made by the county board; and the fact that it made the call for the meeting of the school directors was sufficient evidence *prima facie* that no such school existed. The allegation that, prior to the levy, there was an accredited high school in the county is absolutely unsupported by the evidence.

The local conditions in Rock county are such as to demonstrate that the law may not always operate fairly and satisfactorily to the people of a county, and that under its provisions it is possible for the inhabitants of the county seat town to shift the burden of maintaining the local high school from their own shoulders to those of the people of the county at large. This is a matter for legislative consideration. The court is not authorized to remedy ill-considered or defective legislation, if any there be.

We are unable to see that this tax is levied for an illegal or unauthorized purpose, and therefore no injunction to restrain its collection should be granted.

The judgment of the district court is

AFFIRMED.

FAWCETT and HAMER, JJ., dissenting.

Phillips v. Union P. R. Co.

ERBA J. PHILLIPS, ADMINISTRATRIX, APPELLEE, v. UNION
PACIFIC RAILROAD COMPANY, APPELLANT.

FILED JULY 1, 1916. No. 18762.

1. **Master and Servant: INJURY TO SERVANT: ASSUMPTION OF RISK: PLEADING.** "If the assumption of a risk not usually and ordinarily incident to the service is relied on as a defense in an action against the master for negligence, such assumption of risk must be specially pleaded." *Maxson v. Case Threshing Machine Co.*, 81 Neb. 546.
2. **Damages.** A verdict for \$16,000 in an action under the federal employers' liability act on behalf of a widow for damages for loss of support by reason of the death of her husband, a conductor, who was earning \$113 a month and who had an expectancy of 34 years, plaintiff being younger, held not so large as to indicate that the verdict was the result of passion or prejudice, nor so clearly excessive as to justify interference by the court.
3. **Jury: CHALLENGE.** "It is the duty of the trial court to decide as to the fact of qualification of a juror challenged for cause from a consideration of his entire examination and such other evidence and circumstances as tend to throw light upon the subject. The trial court in determining the fact of qualification is not confined to the answers of the juror alone, but may consider his appearance and general demeanor while undergoing the examination." *Bemis v. City of Omaha*, 81 Neb. 352.
4. ———: ———: **REVIEW.** "In such a case the ruling of the trial court in deciding a challenge for cause will not be disturbed unless an abuse of discretion is shown." *Bemis v. City of Omaha*, 81 Neb. 352.

APPEAL from the district court for Cheyenne county:
HANSON M. GRIMES, JUDGE. *Affirmed.*

Edson Rich, A. G. Ellick and B. W. Scandrett, for appellant.

Devoe & Swenson and Wilcox & Halligan, contra.

FAWCETT, J.

From a judgment in favor of plaintiff, in an action brought under the federal employers' liability act (35 U. S. St. at Large, ch. 149, p. 65), defendant appeals.

Phillips v. Union P. R. Co.

Plaintiff is the administratrix of the estate of her deceased husband, Ray C. Phillips, who was killed March 14, 1913, while employed as a conductor on a freight train being operated by defendant between Cheyenne, Wyoming, and Sidney, Nebraska. While Phillips' train was waiting on a siding about 11 miles west of Sidney, it was run into by a following freight train. Phillips and the rear brakeman, Charles M. Cradit, were in the caboose at the rear of Phillips' train and were killed. A judgment in favor of Cradit's administrator was recently affirmed by this court. *Hadley v. Union P. R. Co.*, 99 Neb. 349. The present action rests upon practically the same evidence. Except as to the question of damages, the evidence in this case was read from testimony given in the *Hadley* case. The evidence is quite fully detailed in the opinion in that case, and it will not be repeated here. Under these conditions, the questions of defendant's negligence, and assumption of risk are controlled by the case cited. New questions presented by this appeal relate to the giving and refusing of instructions, the damages, and the competency of jurors.

Complaint is made of the instructions given by the court. With one or two exceptions the instructions are the same as those given and approved in the *Hadley* case. We find no error in the additional instructions given.

Complaint is also made of the refusal of the trial court to give instructions requested by defendant. Except in regard to the question of assumption of risk, identical instructions were requested and refused in the *Hadley* case, and the rulings of the court approved. Instructions were requested to the effect that Phillips assumed all dangers and risks which were open, apparent, known, and appreciated by him prior to the wreck, whether such dangers and risks resulted from the negligence of defendant or not. The trial court on its own motion gave a proper instruction relating to the assumption of ordinary risks. Risks arising from the employer's negligence are not ordinary, but extraordinary, risks. *Chicago, R. I. & P. R.*

Phillips v. Union P. R. Co.

Co. v. McCarty, 49 Neb. 475; *Grimm v. Omaha Electric Light & Power Co.*, 79 Neb. 387. The defense that plaintiff assumed the risks of defendant's negligence should have been specially pleaded. *Evans Laundry Co. v. Crawford*, 67 Neb. 153; *Maxson v. Case Threshing Machine Co.*, 81 Neb. 546.

It is contended that the verdict and judgment are excessive. The verdict was for \$16,000. At the time of his death Phillips was 30 years of age. His expectancy, according to the table of mortality, was about 34 years. His widow was younger. She testified that for two years preceding his death he had earned an average of \$113 monthly. He used \$25 in paying his expenses while away from home at his work. The remainder was used in supporting himself and his wife and in buying and furnishing a home. On cross-examination she testified that she did not know what his pay checks were for any month in 1912 or 1913. Part of the year he was employed as a brakeman, and for this work his salary was considerably less than when he worked as a conductor. There was no evidence by defendant tending to show that his earnings were less than indicated by plaintiff's testimony. The verdict has been approved by the trial judge. A recovery of \$13,500 was allowed in the *Hadley* case where the decedent was earning from \$85 to \$100 monthly. The verdict cannot be said to be so large as to indicate that it was the result of passion or prejudice, nor can we say that it is excessive.

It is contended that the court erred in overruling defendant's challenges to jurors. One of the acts of negligence relied upon by plaintiff was the operation of trains during the storm. Chief complaint is directed against a ruling of the trial court overruling defendant's challenge to a juror who, when examined in chief, expressed the opinion that it was unsafe to operate trains during the storm. The juror was examined by counsel for defendant and plaintiff and by the court, from all of which it was developed that his opinion was based largely upon his observations of the storm at his home, about 20 miles

Hauth v. Sambo.

southeast from the place of the wreck. In answer to questions by the court, we have the following: "Q. Do you feel that your opinion or impression of the storm as it was at your place would influence you in your judgment from the evidence of the storm at the point of the wreck? A. No. sir; it would not." While the trial court might properly have sustained the challenge, abuse of discretion has not been shown. The rule is:

"It is the duty of the trial court to decide as to the fact of qualification of a juror challenged for cause from a consideration of his entire examination and such other evidence and circumstances as tend to throw light upon the subject. The trial court in determining the fact of qualification is not confined to the answers of the juror alone, but may consider his appearance and general demeanor while undergoing the examination.

"In such a case the ruling of the trial court in deciding a challenge for cause will not be disturbed unless an abuse of discretion is shown." *Bemis v. City of Omaha*, 81 Neb. 352.

Abuse of discretion in deciding the challenges for cause has not been shown. Finding no prejudicial error in the record, the judgment of the district court is

AFFIRMED.

SEDGWICK, J., not sitting.

THERESA HAUTH ET AL., APPELLEES, v. JOHN SAMBO ET AL., APPELLANTS.

FILED JULY 1, 1916. No. 18886.

1. **Intoxicating Liquors: ACTION FOR DAMAGES: PARTIES.** Persons engaged in selling intoxicating liquors under a license are jointly and severally liable for all damages arising from such traffic, to the causes of which they have contributed, and such liability extends to the sureties upon their bonds. All such persons and

Hauth v. Sambo.

their sureties may be joined as defendants in a single action to recover damages.

2. —: BONDS OF LICENSEES. The obligation assumed in a liquor license bond is not purely contractual, but must be interpreted in the light of the provisions of the law regulating the liquor traffic. It is not a bond primarily given to indemnify a private party, though by its terms private parties may avail themselves of its provisions. It is a public bond given to the state as a condition precedent to engaging in the liquor traffic.
3. —: —. While, under the law of suretyship, a bond is, as a general rule, recognized to be purely a contract which, when privately given without any qualifying laws, is to be strictly construed and not extended beyond the scope of the obligation according to its express terms, still a statutory bond to the public, given for the observance of a law authorizing a business only permitted under specified conditions and regulated under the police power of the state, is not in the same sense strictly contractual in its nature. *Andresen v. Jetter*, 76 Neb. 520, and *Sullivan v. Radzewicz*, 82 Neb. 657, distinguished and limited.
4. Witnesses: IMPEACHMENT. Where a party takes the deposition of a witness, and such witness appears at the trial, and, when called to the witness-stand, surprises the party calling him, by testifying at variance with his testimony as given in his deposition, the party calling him may, after interrogating him as to the statements previously made, use the deposition, previously taken, for the purpose of showing such inconsistent statements.
5. Intoxicating Liquors: ACTION ON BOND: LIABILITY. In an action upon a liquor license bond by a widow and minor children, for damages alleged to have been caused by the death of their husband and father, who, while in a state of intoxication, caused by liquors furnished him by the principal in such bond, was upon a railroad track, or in such close proximity thereto as to be struck by a locomotive and killed, the question of negligence on the part of the railroad company, or contributory negligence on the part of the decedent, is immaterial.
6. Torts: JOINT TORT-FEASORS: SETTLEMENT: RELEASE. "Settlement with one of several joint wrongdoers and payment of damages is not a defense to an action against another, unless it was agreed between the parties to the settlement that such payment was in full of all damages suffered. If the settlement is in writing, oral evidence is competent to show the intention of the parties thereto in an action against one not a party to the settlement." *Fitzgerald v. Union Stock Yards Co.*, 89 Neb. 393.

Hauth v. Sambo.

7. **Intoxicating Liquors: CIVIL ACTION: VERDICT: JUDGMENT.** The rule announced in *Bergmann v. Koehn*, 99 Neb. 525, that, in an action against a saloon-keeper and his sureties for damages, in which the jury has returned a verdict against both defendants for a sum in excess of the penalty stipulated in the bond, the trial court has power to render judgment against the principal defendant for the full amount of the verdict, and may also render judgment against the surety for the sum stipulated in the bond, is reaffirmed and declared to be the settled law in this state upon that point.
8. **Appeal: HARMLESS ERROR.** Other assignments of error, set out in the opinion, held insufficient to warrant interference with the judgment.

APPEAL from the district court for Sarpy county: JAMES T. BEGLEY, JUDGE. *Affirmed.*

A. S. Ritchey, W. R. Patrick and I. J. Dunn, for appellants.

W. W. Slabaugh, John W. Battin and A. E. Langdon, contra.

FAWCETT, J.

Action by the widow and minor children of Joseph Hauth, deceased, to recover damages for his death, which it is alleged was contributed to by intoxicating liquors furnished him by defendant Sambo during the night immediately preceding his death. Sambo was a retail liquor dealer in the city of Omaha, and defendant Illinois Surety Company was surety on his bond. The action was instituted and service obtained upon the surety company in Sarpy county, and summons sent to and served upon Sambo, the principal, in Douglas county. The jury returned a verdict against both defendants for \$11,400. Judgment was entered against the principal for the full amount of the verdict, and against the surety for \$5,000, being the amount of the penalty fixed in the bond. Defendants appeal.

A number of errors are assigned, which will be considered in the order in which they are argued in the brief.

Hauth v. Sambo.

Is the verdict sustained by the evidence? The evidence as to whether or not Hauth had been drinking in Sambo's saloon during the night preceding his death, when considered in connection with the circumstances shown, cannot be called conflicting. The period of time covered by the evidence is from about 8 o'clock in the evening of September 21, 1912, until early in the morning of the next day. Plaintiff testified that Hauth was in Sambo's saloon about 8 o'clock in the evening; that others were in there drinking, and Hauth was there with them. She does not testify positively that she saw her husband drink, but she saw beer on the bar at the time, and a fair inference from her testimony is that she saw the others drinking. Her testimony further shows that about 10 o'clock her husband returned to the house, which was within sight of the saloon, got his gun, and returned to the saloon, with the declared intention of going hunting early in the morning; that when he left home at that hour he was not drunk; that he looked all right to her. The evidence clearly establishes the fact that from the time Hauth returned to the saloon at 10 o'clock until 2 or 3 o'clock in the morning, when he, in company with John Drabeck, Sambo's bartender, and one Dan Kennedy, started on their hunting trip, Sambo's saloon was the scene of a drunken carousal, and that during all of that time Hauth was a member of the party; that some time during the night he and one Veit became involved in a controversy which they adjusted by a fight outside of the saloon. The story told by some of defendants' witnesses on the stand, that Hauth was sober when he and his two companions started on the hunting trip at 2 o'clock in the morning, is too incredible, in the face of the facts shown, for any jury to believe. As we view the evidence, and as the jury unquestionably viewed it, it clearly establishes the fact that Hauth was intoxicated when he was struck and killed by the locomotive; that this intoxication was produced by liquors obtained in Sambo's saloon, and was the cause of his losing his life.

Hauth v. Sambo.

The second point argued is that the court erred in overruling the demurrer of each of the defendants on the ground of misjoinder of causes of action. The contention is that there was one cause of action stated against the defendants jointly on the bond, and an additional one against the defendant Sambo upon his liability as a retail liquor dealer, fixed by statute, regardless of and in addition to his contract obligation set forth in the bond. Section 3849, Rev. St. 1913, is as follows: "No person shall be licensed to sell malt, spirituous, and vinous liquors, * * * unless he shall first give bond in the penal sum of five thousand dollars, payable to the state of Nebraska, * * * conditioned that he will not violate any of the provisions of this chapter, and that he will pay all damages, fines and penalties and forfeitures which may be adjudged against him under the provisions of this chapter. * * * Any bond taken pursuant to this section may be sued upon for the use of any person, or his legal representatives, who may be injured by reason of the selling or giving away any intoxicating liquor by the person so licensed or by his agent or servant."

This section of the statute is clear and unambiguous. It makes the furnishing of the bond a condition precedent to the obtaining of a license to sell intoxicating liquors. It is, in every sense of the word, an integral part of the application for a license. The surety, who signs such a bond, knows at the time of doing so that the filing of the bond is one of the necessary conditions which must be complied with before the license is issued. The surety is, therefore, in every true sense of the word, a party to the application. He is charged with knowledge of the fact that the signing of this bond renders him subject to be sued upon it for the use of any person, or his legal representative, who may be injured by reason of the selling or giving away of any intoxicating liquors by the person so licensed, or by his agent or servant. He knows that the bond is conditioned that his principal will not violate any of the provisions of the chapter of the statute relating

Hauth v. Sambo.

to the issuance of such licenses, and that the principal will pay all damages, fines, penalties and forfeitures which may be adjudged against him under the provisions of this chapter. He therefore agrees that, to the amount stated in the bond, he will stand liable to pay all such damages, fines, penalties and forfeitures which may be adjudged against his principal, and this, too, without any condition or reservation that his principal must be first proceeded against. He, in fact, to the amount stated in the bond, makes himself a joint and several principal as to all persons who may be injured by reason of the selling or giving away of any intoxicating liquors by his principal himself, or by such principal's agent or servant. It will be seen from this that a surety on a liquor bond occupies a different relation to such a bond than that occupied by a surety upon ordinary bonds, and the rules applicable to an ordinary bond cannot be applied to a liquor bond with the same strictness with which they are applied to ordinary bonds.

We concede that under the rules governing recovery in actions on ordinary bonds a judgment in excess of the penalty of the bond would be erroneous. In *Andresen v. Jetter*, 76 Neb. 520, and *Sullivan v. Radzuweit*, 82 Neb. 657, the implication is that an action upon a saloon-keeper's bond is governed by the same principles as one upon an ordinary bond. In those cases, however, it will be seen that the distinction under consideration here was not presented or discussed. Where the distinction has been considered, we think the courts are generally holding that the rule in an action on ordinary bonds does not apply in actions upon liquor bonds. In the opinion by Maxwell, J., in *Jones v. Bates*, 26 Neb. 693, it is said: "The bond is merely a mode of securing satisfaction for the injury. In other words, the bond is given as a means of indemnifying persons who may be injured by the saloon-keeper furnishing intoxicating liquors to another." In *Wardell v. McConnell*, 23 Neb. 152, we held that principals and their sureties upon license bonds are liable to an action for damages jointly with the principals and sureties upon

Hauth v. Sambo.

other bonds of a like character, and that sureties upon the bond of a licensed vendor of intoxicating liquors are liable, not only for the damages resulting directly from the acts of their principals, but for all damages to which such acts contribute. On page 159 it is said: "We recognize this as a radical departure from the general law governing principals and sureties, but that it is in accordance with the provisions of the chapter referred to, we entertain no doubt." In *Horst v. Lewis*, 71 Neb. 365, we held that persons engaged in selling intoxicating liquors under a license in this state are jointly and severally liable for all damages arising from such traffic, to the causes of which they have contributed, and that such liability extends to the sureties upon their bonds; that all such persons and their sureties may be joined as defendants in a single action to recover damages. In the opinion, by Mr. Commissioner Ames (p. 367), it is said: "Defendants in such cases are treated both by the statute and by the foregoing decisions as joint wrongdoers, but the statute also creates a right of contribution among them, an element unknown to the common law relative to joint tortfeasors." (p. 368) "But Smith's sureties are obligated for his entire obedience to the law, and are liable, not only for his several or separate breaches of it, but for such breaches thereof, or liabilities thereunder, as he may have committed or incurred jointly with other licensees under the liquor act. They, therefore, to the same degree as their principal, had an interest in the action adverse to the plaintiffs, were proper parties to the action, and were properly served in any county in the state to which a summons was issued." In *Kramer v. Bankers Surety Co.*, 90 Neb. 301, we held: "The sureties on a bond given under the provisions of section 6, ch. 50, Comp. St. 1909, are not merely nominal parties in an action on the bond, but have such an interest in the action that an action on the bond may be brought against them in any county where they reside or may be found and, under section 65 of the Code, a summons properly issued to any other county for service on their principal." In *Black*,

Intoxicating Liquors, sec. 281, it is said: "The action given under the civil damage laws is entirely statutory, and hence must be governed wholly by the provisions of the statute." In *Squires v. Miller*, 173 Mich. 304, it is held: "The obligation is not purely contractual, but must be interpreted in the light of the provisions of law regulating the liquor trade." In the opinion, on page 311, it is said: "This is not a bond primarily given to indemnify a private party, though by its terms private parties may avail themselves of its provisions. It is a public bond given to the commonwealth as a condition precedent to engaging in the liquor traffic, a business which, as a matter of public policy, is regulated and restricted under the police power of the state." Again, on page 312, it is said: "While, under the law of suretyship, a bond is, as a general rule, recognized to be purely a contract which, in its nature, when privately given without any qualifying laws, is to be strictly construed and not extended beyond the scope of the obligation according to its express terms, still a statutory bond to the public, given for the observance of a law authorizing a business only permitted under specified conditions and regulated under the police power of the state, is not in the same sense strictly contractual in its nature. Its characteristics are also, and perhaps to a greater degree, statutory. It is to be read and construed and enforced in connection with and according to the statute pursuant to which it is given, and should be interpreted according to the purpose, intent, and meaning of the legislative enactment."

In order that there may be no doubt in the future as to the rule in actions on liquor bonds, the rule announced in the *Jetter* and *Radzuweit* cases will be considered as limited to actions on ordinary bonds.

In *Bergmann v. Koehn*, 99 Neb. 525, we held: "In an action against the saloon-keeper and his surety for damages, in which the jury has returned a verdict against both defendants for \$9,000, the trial court has the power to render a judgment against the principal defendant for

Hauth v. Sambo.

the full amount of the verdict, and may also render judgment against the surety for the sum of \$5,000, which is the amount for which the surety company is liable on its bond." A motion for rehearing was filed in that case, which we have held until the question there decided could be re-examined in the case at bar, which had been argued and submitted at the time such motion for rehearing had been filed. Under the authorities above cited, and after a careful re-examination of the question, we now reaffirm the above holding in *Bergmann v. Koehn* and announce it as the settled law upon that point in this court.

The third assignment is that the court erred in giving instruction No. 8, which defines the term "intoxication." While the definition of the term is not quite as explicit as it might be, it could not have prejudiced the jury, for the reason that the evidence of intoxication was so strong that the jury could not have been misled by the definition given.

The fourth assignment assails instruction No. 5, given by the court, which told the jury that the liability of a surety upon the bond of a liquor dealer is coextensive with that of the principal, and that their verdict with respect to the surety company should be the same as their verdict as to the principal. The surety company cannot complain of this instruction, for the reason that, to the extent of the penalty named in the bond, its liability was coextensive with that of the principal, and the court in entering judgment limited its liability to that sum. Defendant Sambo cannot complain, as his liability was not limited by the bond.

The fifth assignment challenges instruction No. 10, given by the court, in which the jury were told that it was not material whether the employees of the railroad company were negligent or not, or whether or not the railroad company was liable for damages, if any, sustained by plaintiff; that the question for the jury to determine was whether the deceased was intoxicated at the time of his death, and whether the defendant Sambo furnished the

Hauth v. Sambo.

intoxicating liquor, or some part thereof, and whether in consequence of such intoxication Hauth lost his life. It is claimed that this instruction was not applicable to the case, and that the case of *Cornelius v. Hultman*, 44 Neb. 441, from which the instruction was taken, was an entirely different case from the one at bar. It is said this instruction was an invitation to entirely disregard the defense set up in the answers of the defendants that plaintiff had made claim against the railroad company and had received full settlement and satisfaction for all loss and damage sustained by her by the death of Joseph Hauth. We think the instruction was proper. As stated by counsel for plaintiff in their brief, the question is whether the liquor furnished Hauth contributed to his injury and death; that it is immaterial whether he was guilty of contributory negligence in relation to the railroad, or whether the railroad was negligent. We think that, if Hauth's getting upon the railroad track, or in such close proximity to it as to receive the injury which caused his death, was the result of intoxication from liquors obtained in Sambo's saloon, the question of negligence or contributory negligence is, as the court stated, immaterial.

In the sixth assignment instruction No. 17 is complained of. It told the jury that if they found for the plaintiff they would determine the amount of the damages to which plaintiff was entitled under the evidence, and deduct from said amount the sum which the evidence shows had been paid plaintiff by the Chicago, Burlington & Quincy Railroad Company, to wit, the sum of \$1,100, and render a verdict for the remainder. The complaint to this instruction is that but one injury resulted in this case, viz., the death of Hauth; that plaintiff was entitled to only one satisfaction for the loss sustained by his death, and that she obtained that satisfaction from the railroad company. There can be no controversy over the rule of law invoked, but we think it is not applicable here. The contract of settlement between plaintiff and the railroad company is before us. It shows upon its face that it is a compromise

Hauth v. Sambo.

settlement made by plaintiff in the face of a probably well-grounded denial by the railroad company of all liability. On this kind of a settlement plaintiff accepted from the railroad company \$1,100. The agreement nowhere recites that plaintiff released other joint tort-feasors, or that the amount for which she compromised her claim with the Burlington road was the full amount of her damages. This point is ruled adversely to defendants' contention in *Fitzgerald v. Union Stock Yards Co.*, 89 Neb. 393.

The seventh assignment is that the court erred in refusing to direct a verdict for defendants. In the light of what has been said, nothing need be added here.

The eighth and ninth assignments relate to the witnesses Fox and Veit, who on the trial testified directly at variance with the testimony which they had given a short time prior thereto in depositions. They were interrogated as to their contradictory statements in the depositions, and either denied making them or said they "did not remember." Counsel for plaintiff were then permitted to show this difference in their testimony by calling the stenographer who took the depositions. These two assignments involved the question of the right of the court to permit a party, who has been taken by surprise on the trial by having a witness whom he has introduced testify contrary to statements made by such witness to counsel prior to the trial, to impeach his own witness. It is contended that this cannot be done. Many authorities, in addition to those cited, could be found showing that to be the general rule; but, like all general rules, it has its exceptions. The exception to the rule is well sustained in *Selover v. Bryant*, 54 Minn. 434, and in the note to the case in 21 L. R. A. 418, and in *Doran v. Waterloo, C. F. & N. R. Co.*, 170 Ia. 614.

The tenth assignment assails the refusal of the court to give instruction No. 9, requested by defendants, by which the court was requested to tell the jury that, if they found from all the circumstances and evidence in the case that the accident which caused the death of Hauth would have happened whether he was intoxicated or sober, and that

Hauth v. Sambo.

the liquor furnished by defendant Sambo, if any was furnished, did not contribute to the accident, then their verdict should be for the defendants. The first point in this instruction called for speculation on the part of the jury, and the second point is properly covered by the instructions given by the court.

The eleventh assignment complains of the refusal of the court to give instruction No. 6, requested by defendants, as follows: "You are instructed that the plaintiffs are not entitled to recover damages for the loss of the society and companionship of the husband and father, nor for injuries to the feelings and sentiments caused by the intoxication and drunkenness of the husband and father, nor can damages be allowed by way of compensation for grief, wounded feelings and disappointed hopes." By instruction No. 16, given by the court on its own motion, the jury were correctly told just what things they might consider in determining the amount of the damages to be awarded in case they found for plaintiff, and concluded with this statement: "But in no event can the amount of damages exceed the value to plaintiffs of the support of deceased, which was lost to them through his death." No claim is made in the petition for damages on any of the grounds stated in the requested instruction. The instruction was properly refused.

The final assignment assails instructions 4, 10 and 14, given by the court, on the ground that they are contradictory, misleading and inconsistent. We are unable to agree with counsel upon this point.

Finding no prejudicial error in the record, the judgment of the district court is

AFFIRMED.

HAMER, J., not sitting.

Dohner v. Barr.

JOSEPH R. DOHNER, APPELLEE, v. JOHN M. BARR, APPELLANT.

FILED JULY 1, 1916. No. 18889.

Appeal: CONFLICTING EVIDENCE. "Where the evidence is conflicting and the judgment is supported by competent evidence, it will not be disturbed, even though a different conclusion might have been reached." *Burwell Irrigation Co. v. Lashmett*, 59 Neb. 605.

APPEAL from the district court for Lancaster county:
ALBERT J. CORNISH, JUDGE. *Affirmed.*

R. O. Williams, for appellant.

W. C. Frampton, contra.

FAWCETT, J.

Action to recover a balance of \$50 for money loaned. Plaintiff recovered, and defendant appeals.

The errors assigned are that the court by its instructions to the jury eliminated defendant's plea of payment; that the court refused to give certain instructions requested by defendant; that the court neglected to give any instruction covering defendant's theory that the money had been paid; and that the verdict is not sustained by sufficient evidence. The evidence is in sharp conflict. It would have sustained a verdict either way. The jury accepted the testimony offered by plaintiff, and an experienced district court, who saw the witnesses upon the stand and heard them testify, approved the verdict by entering judgment upon it. This must be held conclusive on the question of the sufficiency of the evidence.

We have examined the instructions given by the court, also those requested by defendant, and are unable to discover any error either of omission or commission. The defendant's plea of payment was properly submitted. Everything requested by defendant in instructions refused,

Latham v. Chicago, B. & Q. R. Co.

which was proper to go to the jury, was covered by the court's instructions. The instructions we think fairly covered defendant's theory that the money had been repaid.

Finding no prejudicial error in the record, the judgment of the district court is

AFFIRMED.

SEDGWICK, J., not sitting.

W. H. LATHAM ET AL., APPELLEES, v. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY ET AL., APPELLEES; DAVID C. BALLANTINE ET AL., INTERVENERS AND APPELLANTS.

FILED JULY 1, 1916. No. 18905.

1. **Parties: INTERVENERS.** "To authorize a party to intervene, he must have an interest of such a direct and immediate character that he will either gain or lose by the direct legal operation of and effect of the judgment. This interest must be one arising from a claim to the subject-matter of the action or some part thereof, or a lien upon the property or some part thereof." *Kansas & C. P. R. Co. v. Fitzgerald*, 33 Neb. 137, 142.
2. **Drainage Districts: OBJECTIONS TO ORGANIZATION: INTERVENTION.** Upon the hearing of objections to the organization of a drainage district by the district court, owners of lands outside of the proposed district who have not been made parties to the proceeding, who refuse to become members of the district, and whose lands are not subject to assessment for the cost of the proposed improvements, cannot intervene and object to the organization of the district on the ground that the construction of the drainage improvements will injure their lands which adjoin a stream below the outlet of the proposed drainage ditch. Rev. St. 1913, sec. 1799.

APPEAL from the district court for Frontier county:
LESLIE G. HURD, JUDGE. *Affirmed.*

J. A. Williams, for appellants.

Byron Clark, W. H. Latham and L. H. Cheney, contra.

Latham v. Chicago, B. & Q. R. Co.

FAWCETT, J.

Plaintiffs, who are owners of Swamp and overflowed lands traversed by Medicine creek, filed with the clerk of the district court for Frontier county articles of association for the organization of a drainage district. Rev. St. 1913, secs. 1797-1865. Summons was served upon the Chicago, Burlington & Quincy Railroad Company and upon Frontier county, the other owners of land within the proposed district. A number of owners of lands below the proposed drainage ditch intervened and challenged the right of plaintiffs to form the proposed district. After a hearing, the district court authorized the formation of the drainage district, and the interveners have appealed.

In the district court plaintiffs challenged the right of interveners to oppose the formation of the drainage district. Intervenors are not the owners of real estate within the proposed district, and their lands will not be assessed to pay the cost of the drainage. Though requested to do so, they have refused to join with plaintiffs in the organization of a drainage district. Medicine creek flows eastward and southerly in a tortuous channel through the lands of plaintiffs and on through the lands of interveners. The proposed drainage ditch, including the lateral, is two and a half miles long. It taps the creek on lands of plaintiffs and returns to the creek before leaving their lands. The ditch has the same carrying capacity as the creek, but shortens the distance about one-half. Intervenors challenge the right of plaintiffs to organize a drainage district on the ground, among others, that the straightening of the channel will so accelerate the flow of the water in the creek as it crosses interveners' lands that it will wash and overflow the same, and also deprive them of the benefits of subirrigation. Are interveners entitled to object to the formation of the drainage district on the alleged ground that the construction of the drainage ditch will be to their damage as owners of land adjoining the creek below the outlet of the ditch? Intervenors contend that their action is authorized by the statute, which provides:

"Any person who has or claims an interest in the matter in litigation, in the success of either of the parties to an action, or against both, in any action pending or to be brought in any of the courts of the state of Nebraska, may become a party to an action between any other persons or corporations, either by joining the plaintiff in claiming what is sought by the petition, or by uniting with the defendants in resisting the claim of the plaintiff, or by demanding anything adversely to both the plaintiff and defendant, either before or after issue has been joined in the action, and before the trial commences." Rev. St. 1913, sec. 7609.

This section must be read in connection with the provisions of the drainage act. The act provides for the filing of articles of association showing, among other matters, the boundaries of the proposed district, the names of owners signing the articles, and a description of the real estate within the proposed district, and the names of owners of real estate within the district benefited by the proposed construction who refused to sign the articles. Rev. St. 1913, sec. 1797. Notice of the proposed organization must be given to all owners of land within the district who have not signed the articles of association. Rev. St. 1913, sec. 1798. The statute further provides:

"All owners of real estate situated in the proposed district who have not signed the articles of association and who may object to the organization of the drainage district, after having been duly summoned shall, on or before the second day of the term of court to which they have been summoned to appear, file their objection or objections in writing, if any they may have, why such drainage district should not be organized and declared a public corporation of this state, and why their land will not be benefited by drainage, and should not be embraced in the drainage district and liable to taxation for draining the same; and all such objections shall be heard by the court in a summary manner, without any unnecessary delay, and, in case such objections are overruled, the district court shall, by its

Latham v. Chicago, B. & Q. R. Co.

order duly entered of record, duly declare the drainage district a public corporation of this state. * * * And in case any owner of such real estate shall satisfy the court that his real estate, or a part thereof, has been wrongfully included in the district, and will not be benefited thereby, then the court may exclude such real estate as will not be benefited, and declare the remainder a district as prayed for." Rev. St. 1913, sec. 1799.

The intent of the statute is that upon the hearing by the district court the proceedings shall be "in a summary manner, without any unnecessary delay." Provision is made for hearing the objections of owners of real estate within the district. The statute does not contemplate that the question of the rights and liabilities of the district to third persons shall be determined in such proceeding. It is not intended that landowners without the district who will not be assessed for the cost of the improvements shall prevent the organization of a drainage district by landowners consenting to be assessed for the cost of the improvements. The drainage act does not contemplate that the question of damages raised by third persons shall be decided at the hearing upon the application for the formation of a district, and the statute permitting intervention is not applicable. "To authorize a party to intervene, he must have an interest of such a direct and immediate character that he will either gain or lose by the direct legal operation of an effect of the judgment. This interest must be one arising from a claim to the subject-matter of the action or some part thereof, or a lien upon the property or some part thereof." *Kansas & C. P. R. Co. v. Fitzgerald*, 33 Neb. 137, 142.

Zumbro v. Parnin, 141 Ind. 430, and *State v. Board of County Commissioners*, 98 Minn. 89, relied upon by interveners, were decided under drainage laws containing different language. Whether the construction of the ditch would wrongfully damage interveners as alleged is a question to be decided in other proceedings. The statute provides that the district may be sued, and that it "shall be

Johnson v. Lane.

liable for all injuries and damages caused by the construction of said drainage improvements arising by virtue of contract or tort." Rev. St. 1913, sec. 1864. The district is given the power of eminent domain to acquire rights of way whether within or without the district. Rev. St. 1913, secs. 1816, 1817. Rights of landowners without the district may be protected in proper proceedings. The trial court properly found against interveners. Owners of real estate within the district are not opposing the formation of the district, and questions presented by interveners relating to the legality of the organization need not be decided on this appeal.

The judgment of the district court is therefore

AFFIRMED.

SIDNEY G. JOHNSON, APPELLANT, v. CHARLES C. LANE, APPELLEE.

FILED JULY 1, 1916. No. 18936.

1. **Appeal: CONFLICTING EVIDENCE.** "Where the evidence is conflicting and the judgment is supported by competent evidence, it will not be disturbed, even though a different conclusion might have been reached." *Burwell Irrigation Co. v. Lashmett*, 59 Neb. 605.
2. —: **HARMLESS ERROR.** "To warrant the reversal of a judgment, it must affirmatively appear from the record that the ruling with respect to which error is alleged was prejudicial to the rights of the party complaining." *Dodry v. Western Mfg. Co.*, 58 Neb. 667.

APPEAL from the district court for Douglas county:
ALEXANDER C. TROUP, JUDGE. *Affirmed.*

Sutton, McKensie & Cox, for appellant.

John J. Sullivan and W. R. Mitchell, contra.

Johnson v. Lane.

FAWCETT, J.

From a judgment of the district court for Douglas county, for damages claimed by plaintiff to have been suffered by reason of fraudulent misrepresentations of the defendant with respect to certain real estate in the states of Kansas and Oklahoma, for which plaintiff exchanged a stock of implements owned by him in Clifton, Kansas, plaintiff appeals.

Defendant was a real estate broker, and as such was representing the owners of the Kansas and Oklahoma lands. He negotiated the exchange for his principals with plaintiff. The transaction was completed and the properties duly exchanged. Plaintiff now complains that the lands were not of the quality, quantity and value represented by defendant, and prays for damages by reason thereof in the sum of \$11,000. The answer is a general denial. More than 20 witnesses were examined at the trial. Their testimony is set out in a bill of exceptions of over 300 pages. On every material point in the case it is in sharp conflict. A careful examination of it shows that it is ample to have sustained a verdict either way. In arriving at a verdict either way, the jury would be compelled to entirely discredit many of the witnesses on one side or the other. This was clearly the province of the jury who saw 13 of the 22 witnesses upon the witness-stand and heard them testify. We must accept their judgment on this point.

Complaint is made of some of the instructions given by the court. The action is grounded on alleged fraudulent misrepresentations of the defendant. The jury found for the defendant. By that verdict they have said that the defendant is not guilty of having made the fraudulent misrepresentations charged. In reaching this conclusion they have accepted the testimony of the witnesses offered by defendant as true. This fact being established, then, when the instructions are applied to that evidence, they contain no prejudicial error.

Complaint is especially made of instruction No. 7, given by the court. By this instruction the court told the jury that one Jesse T. Parker was the agent of plaintiff and acted as such in assisting to consummate the transaction between plaintiff and the owners of the property represented by defendant, and that it was the duty of an agent to communicate to his principal every fact affecting a transaction, entrusted to his care, which comes to his knowledge in the course of and during its performance. "and, unless it is shown that the agent, with the knowledge of the adverse party, has acted fraudulently under such circumstances as to apprise the latter that facts communicated to the agent have not been, and probably will not be, communicated by him to his principal, or the adverse party is in some way implicated with the default of the agent, this duty, in an action between the principal and the adverse party, the agent is conclusively presumed to have obeyed." It is contended that this instruction was prejudicial, for the reason that no restriction of any nature was named therein. We do not deem it necessary to enter upon a discussion of the instruction. We are relieved of that burden by what is stated by plaintiff in his brief. It is there said: "There is nothing in the record to indicate that Mr. Parker was employed by the defendant to inspect and place a value upon the property which plaintiff was to receive. In fact, the principal himself was taken to view the property and made the inspection for himself." In the light of this admission, we are not surprised that the jury found for the defendant on the question of fraudulent misrepresentations by defendant as to the character, value and quantity of the lands which plaintiff was to receive in the transaction. Having made the inspection himself, and there being no claim that he was not shown the land involved in the proposed exchange, the instruction given was without prejudice.

Complaint is made of the refusal of the court to give three instructions requested by plaintiff. All three of these instructions related to the question of the measure of

Kriebs v. Kriebs.

damages in the event that the jury found for plaintiff. The jury having found for defendant, error, if any, in the refusal to give these instructions would be without prejudice.

We have gone over appellant's brief three times, and have made a careful examination of the record for the purpose of satisfying ourselves that no fraud was committed by defendant. In the light of that examination, we concede that another jury *might* reach a different conclusion from that reached by the jury which heard the case, but that is not sufficient to justify us in ordering a new trial. In order to do that, we must be able to say that the verdict was clearly wrong. This we cannot say.

AFFIRMED.

SEDGWICK, J., not sitting.

ETHEL M. KRIEBS, APPELLEE, v. NICHOLAS KRIEBS ET AL.,
APPELLANTS.

FILED JULY 1, 1916. No. 18937.

Appeal: QUESTIONS REVIEWABLE. "When a bill of exceptions has been quashed, no question can be considered, a determination of which necessarily involves an examination of the bill of exceptions."
Reed v. Rice, 48 Neb. 586.

APPEAL from the district court for Douglas county:
LEE S. ESTELLE, JUDGE. *Affirmed.*

Amos E. Henely, for appellants.

Montgomery, Hall & Young and T. M. Zink, *contra.*

FAWCETT, J.

From a judgment of the district court for Douglas county, in favor of plaintiff, in an action for alienation of the affections of her husband, defendants appeal.

Kriebs v. Kriebs.

Defendants failed, for more than eight months after the adjournment of the term of court at which judgment was entered, to settle a bill of exceptions, and on motion of plaintiff it was quashed. The case is therefore before us upon the transcript alone. The defendants are the parents of plaintiff's husband. The petition alleges, in detail, most inexcusable conduct on the part of the defendants toward plaintiff in the presence of her husband, and while she and her husband were living with the defendants in their home. At the trial the jury returned a verdict in favor of plaintiff for \$5,000, upon which the court, after overruling separate motions for a new trial, entered judgment. The answer of defendant Nicholas was a general denial. The answer of defendant Ida was a general denial, followed by a third paragraph which alleged that, in all of her conduct, statements, acts and doings toward plaintiff and her husband, the answering defendant acted without any ill will or malice toward plaintiff, and had only advised and done that which she fairly and honestly considered to be to the best interests of her said child.

The first assignment of error is based upon instruction No. 1, which stated the issues. In this statement the court correctly set forth the answer of defendant Nicholas, and also correctly set forth the substance of the answer of defendant Ida, with the exception that it failed to state the substance of paragraph 3 of the answer above referred to, and concluded thus: "And these are the only material allegations in defendants' answers." It is contended here that this instruction failed to set forth "the affirmative defense of the answer of the defendant Ida Kriebs." If the evidence in any manner tended to sustain the allegations in paragraph 3 of defendant Ida's answer, the failure to state it as one of the material issues in the case would have been error on the part of the court; but, if the evidence clearly failed to establish such allegation, its omission from the statement of the issues was justifiable and would not be error. The evidence is not before us. If it came anywhere near sustaining the allegations of out-

City of Lincoln v. Lincoln Gas & Electric Light Co.

rageous treatment of plaintiff by the defendants, as set forth in the petition, it would completely destroy any claim on the part of defendant Ida that she acted without ill will or malice and had only done that which she fairly and honestly considered to be to the best interests of her son. In the absence of the bill of exceptions, we must assume that the evidence was sufficient to sustain the court in not submitting that issue to the jury. The same must be said of all other instructions complained of in the brief.

We see no way in which we can give defendants any relief on this appeal. The pleadings are ample to sustain the instructions given by the court and the verdict returned by the jury.

AFFIRMED.

LETON and SEDGWICK, JJ., not sitting.

CITY OF LINCOLN, APPELLEE, v. LINCOLN GAS & ELECTRIC
LIGHT COMPANY, APPELLANT.

FILED JULY 1, 1916. No. 18405.

Taxation: OCCUPATION TAX: DISCRIMINATION. When there are several public service corporations engaged in furnishing heat, light and power to the people of a city and occupying the streets, alleys and public places of the city, with their apparatus for that purpose, under franchise granted by the city, the fact that one furnishes heat, light and power by electric current conveyed by wires and the other by gas conveyed by underground mains does not furnish a sufficient basis for classification to justify levying an occupation tax upon one of such companies and not upon the other. A tax so levied is void for unjust discrimination.

APPEAL from the district court for Lancaster county:
ALBERT J. CORNISH, JUDGE. *Reversed and dismissed.*

Strode & Beghtol, for appellant.

C. Petrus Peterson, contra.

City of Lincoln v. Lincoln Gas & Electric Light Co.

SEDGWICK, J.

In November, 1906, the city of Lincoln by ordinance No. 432 provided that no gas company should "charge, exact, demand or collect * * * more than the sum of one dollar net per 1,000 cubic feet," and in December of that year the defendant city by ordinance No. 439 imposed an occupation tax on all gas companies of $2\frac{1}{2}$ per cent. of the gross receipts of the company. Afterwards, on the 27th day of December of that year, this defendant began an action in the circuit court of the United States, district of Nebraska, alleging that both ordinances of the city were invalid, and asking for an injunction against their enforcement. In May, 1908, the city of Lincoln began this action in the district court for Lancaster county to recover the occupation tax provided for in the aforesaid ordinance. This action was not finally determined in the district court until in July, 1913, when that court entered a judgment against the defendant.

One of the objections to the ordinance imposing this tax is that it "denies to defendant the equal protection of the laws, and is unjust and discriminatory in its classification." The ordinance imposes a tax of $2\frac{1}{2}$ per cent. on "all gas companies manufacturing and furnishing gas to the inhabitants of the city of Lincoln." The defendant furnishes gas for heat, light and power purposes, and there is at least one other company which has a franchise from the city, occupying streets and public places in the city as the defendant does, and furnishes heat, light and power by electric current as a public service corporation. There is no just basis of classification which will allow the imposition of an occupation tax upon one of two companies so organized with such privileges and not upon the other, when both companies are engaged, and competing as public service corporations, in furnishing the public generally with heat, light and power. The fact that the companies use different modes of conveying their product and supplying the de-

City of Lincoln v. Lincoln Gas & Electric Light Co.

sired accommodations is not a sufficient basis for discriminating in exacting an occupation tax. In the action brought in the circuit court of the United States for this district by this defendant to restrain the enforcement of the so-called "dollar gas" ordinance, that court considered that it was necessary to determine the validity of the ordinance involved in this case, and in its opinion said: "The occupation tax of 2½ per cent. for the year 1907 would have amounted to \$4,484.15. This occupation tax I think invalid, as violating the Constitution of the state of Nebraska, requiring it to be uniform upon persons and property. In my judgment, an electric plant, which furnishes to the public light, heat, and power, should be classed the same as a gas plant, which furnishes to the public light, heat, and power. The fact that one furnishes the light, heat, and power by means of an electric current—the other by a current of gas—does not, in my judgment, justify a difference in classification. So far as the patrons are concerned, it is results that are sought for, and it is results which the respective parties furnish the public." The opinion was filed March 20, 1909. That court then enjoined the enforcement of this ordinance. *Lincoln Gas & Electric Light Co. v. City of Lincoln*, 182 Fed. 926. An ordinance passed in March, 1906, levied an occupation tax of 2 per cent. on the business of manufacturing electric current. In December, 1909, after the said decision in the "dollar gas" case, an ordinance was enacted repealing both of the former ordinances and levying an occupation tax of 3 per cent. on the manufacture and sale of gas and electric current. We think the federal court was right in holding the first ordinance invalid, and it follows that the plaintiff can have no right of action thereunder. The judgment of the district court is reversed and the action dismissed.

REVERSED AND DISMISSED.

LETTON, J., dissenting.

I am unable to concur in the view of the majority. The opinion holds, without citing a single authority to

City of Lincoln v. Lincoln Gas & Electric Light Co.

sustain the position, that there is not sufficient difference between a gas company and an electric light and power company to classify them as different occupations for the purpose of imposing a business tax, and that such a tax imposed upon one of these occupations and not upon the others is void for that reason. The general principle as to such cases is clearly stated in 37 Cyc. 732, as follows: "The principle of equality and uniformity does not require the equal taxation of all occupations or pursuits, nor prevent the legislature from taxing some kinds of business while leaving others exempt, or from classifying the various forms of business, but only that the burdens of taxation shall be imposed equally upon all persons *pursuing the same avocation*." No provision of either statute or constitution has been pointed out to justify the conclusion reached, and I think none can be found.

The real question is whether there is any such difference in the occupation of manufacturing and selling gas and that of producing and selling electricity as to afford room for classification. It seems to me there is no room for doubt here. An electrician carries on an entirely different occupation from that of a gas-maker, and makes a different product, though it may be used for some similar purposes. There is no more resemblance between them than between a Christian Science healer and a physician of the most rigid allopathic school; or between a surgeon and an osteopath or chiropractor. Can it be said that an occupation tax upon physicians is invalid because no tax is imposed upon mental healers, osteopaths or Christian Science practitioners? Yet, all these classes attempt to perform the same function, that of healing bodily ills. A baker and a butcher and a grocer all sell food. Is there no distinction between them for the purpose of taxation? Steam laundries and poor wash-women perform exactly the same service. Under the law as laid down in the opinion, an occupation tax cannot be levied upon steam laundries unless it also includes

City of Lincoln v. Lincoln Gas & Electric Light Co.

within its terms the poor woman, or the Chinese laundryman, because the product of their labor is the same. But the question involved has repeatedly been decided in this state. As recently as in *Norris v. City of Lincoln*, 93 Neb. 658, it was held that the business of loaning money upon chattel security might be taxed, though the business of loaning money on every other kind of security or without security was exempt. The contention was made in that case, as in this, that the tax was discriminatory and void. The subject is lucidly discussed by Judge Barnes in the opinion, and the conclusion expressed in the syllabus that, "When a city charter authorizes a municipality to require by ordinance a license tax of persons engaged in any occupation, trade, or business carried on within the corporate limits of the city, the municipal authorities may by ordinance classify the different occupations for taxation, and impose different taxation in different amounts upon the different classes; and a classification made by such authorities will not be interfered with by the courts, unless it manifestly appears that it is unreasonable and arbitrary." Up to this time this has been settled law in this state.

In *State v. Insurance Co. of North America*, 71 Neb. 320, an occupation tax which discriminated as to insurance companies between those whose domicile was in a state the laws of which discriminated against outside companies, and those whose domiciles were in states which had no such laws, was held to be valid. Yet, both were selling insurance.

In *Rosebloom v. State*, 64 Neb. 342, it was held that there was such a distinction between peddlers who sell their own products and those who sell the productions of others that the legislature may make this a basis of classification for the purpose of taxation, and said: "The real test of the validity of defendant's objection to this statute is not whether the classification is wise and just, but whether the legislature acted arbitrarily,

City of Lincoln v. Lincoln Gas & Electric Light Co.

whether, without an adequate determining principle, it made a division of peddlers into two classes, and then sought to deprive one class of their constitutional right to the equal protection of the laws. If there is a genuine and substantial distinction between persons who go from house to house, and place to place, vending their own products, and those who sell in the same manner the productions of others, the classification is founded in the nature of things, and is therefore upon a basis everywhere recognized as lawful." See, also, *Magneau v. City of Fremont*, 30 Neb. 843; *Aachen & Munich Fire Ins. Co. v. City of Omaha*, 72 Neb. 518; *Western Union Telegraph Co. v. City of Fremont*, 39 Neb. 692.

Section 1, art. IX of the Constitution, provides: "The legislature * * * shall have power to tax peddlers, auctioneers, * * * in such manner as it shall direct by general law, uniform as to the class upon which it operates."

Mr. Dillon says, in 4 *Municipal Corporations* (5th ed.) sec. 1410: "Such constitutional provisions do not preclude the classification of occupations for purposes of taxation, and their requirements are satisfied if all the persons in a particular class of business are taxed alike or upon the same principle, although other and distinct vocations and businesses are not taxed or are taxed at a different rate." This is the doctrine formerly adopted in this state, but set aside by the majority opinion.

The tax imposed upon the defendant is for revenue purposes. "An ordinance having no element of regulation, and showing on its face that the sole purpose of the city authorities in adopting it was to raise revenue, is a tax ordinance, even though the right to engage in the business or calling taxed is made to depend upon paying the tax and obtaining a license." *State v. Boyd*, 63 Neb. 829.

City of Lincoln v. Lincoln Gas & Electric Light Co.

An occupation tax may be unjust and discriminatory; it may tax a few occupations and leave scores of others untaxed; but, as long as there is a reasonable basis for classification and it acts uniformly upon the class or occupation of persons taxed, it is not invalid under the Constitution, and the courts should not interfere.

Rose, J., not participating.

CITY OF LINCOLN, APPELLEE, v. LINCOLN GAS &
ELECTRIC LIGHT COMPANY, APPELLANT.

FILED JULY 1, 1916. No. 18406.

1. **Corporations: CHARGES: VALIDITY OF OCCUPATION TAX.** An occupation tax against a public service corporation, if valid, so directly affects the question of rates of service that in determining whether a rate is remunerative or confiscatory the validity of an alleged occupation tax must necessarily be considered and determined.
2. **Abatement.** An action in the state courts to recover an occupation tax against such corporation, begun while an action is pending in the courts of the United States to determine whether another ordinance regulating the rates of service of such corporation is confiscatory, should be abated until the action in the federal court is finally determined.

APPEAL from the district court for Lancaster county:
ALBERT J. CORNISH, JUDGE. *Reversed, with directions.*

Strode & Beghtol, for appellant.

C. Petrus Peterson, contra.

SEDGWICK J.

This action was begun in December, 1910. The first petition alleged an ordinance, No. 732, enacted in December, 1909, levying an occupation tax of 3 per cent. on gross receipts of "every person or corporation engaged in the business of selling electricity or gas in the city of

City of Lincoln v. Lincoln Gas & Electric Light Co.

Lincoln, Nebraska." The petition asks for accounting, general equity, and judgment. The petition was afterwards amended. In the last amendment there is an additional allegation that in 1908 an ordinance, No. 570, was enacted, levying an occupation tax on the business of furnishing electric current, and that the ordinance of December, 1909, repealed the ordinance No. 570 of 1908; that the said ordinance of 1908 was in "full force and effect from the 15th day of April, 1908, to the 15th day of January, 1910, when it was repealed" by the said ordinance of 1909, No. 732, and that "said repealing ordinance specifically reserved all right of the city of Lincoln to commence or prosecute any actions or proceedings for the collection of any tax levied in the ordinance so repealed." It seeks to recover the occupation tax which accrued while that ordinance was in force.

When this action was begun, the action in the federal court begun by this defendant against this plaintiff and its officers, more fully considered in *City of Lincoln v. Lincoln Gas & Electric Light Co.*, ante, p. 182, had been decided by the circuit court, and the occupation tax perpetually enjoined. The amended complaint in the said action in the circuit court of the United States asked for an injunction *pendente lite*, enjoining the enforcement of an ordinance, No. 432, being an ordinance regulating the price of manufactured gas. The complaint asked for no injunction *pendente lite* enjoining the occupation tax ordinance, but contained a prayer for "such further or other relief in the premises as the nature of the circumstances of this case may require." The trial court found that the occupation tax ordinance was void and entered a judgment enjoining its enforcement. It found that the "dollar gas" ordinance was valid and refused to enjoin its enforcement. It appears to be conceded that the validity of the occupation tax ordinance was involved in that litigation, since such tax, if valid, would directly affect the net receipts of the company and so would be an important factor in determin-

City of Lincoln v. Lincoln Gas & Electric Light Co.

ing a remunerative and just rate. The gas company appealed to the supreme court of the United States, and that court (223 U. S. 349) reversed the judgment of the circuit court and entered a judgment in which it recited the decree of the district court, including the finding of that court, as follows: "The court further finds that the ordinance of the city of Lincoln, levying an occupation tax against the complainant, violates the Constitution of the state of Nebraska, and is, for that reason, illegal and void, and that the enforcement of the same as to complainant should be perpetually enjoined. It is therefore adjudged and decreed that a permanent injunction be, and the same is hereby, granted, perpetually enjoining the city of Lincoln from enforcing said occupation tax ordinance." The supreme court entered the following as a part of its judgment: "And it is further ordered that this cause be, and the same is hereby, remanded to the district court of the United States for the district of Nebraska, with directions to refer the case to a competent and skilled master, to report fully his finding upon all of the questions raised by either party, separately, and with leave to both parties to take any additional evidence they may wish within a time to be fixed by that court, and that that court, upon such report, proceed as equity shall require." One of the questions raised was as to the validity of the occupation tax ordinance, and this order of the supreme court requires the master to take evidence and "report fully his finding" upon this question, and the judgment of the supreme court continued: "It is further ordered, adjudged, and decreed for the protection of all parties that the injunction granted in the court below continue in force until final decree there."

The question whether the judgment of the supreme court reversed the decree of the lower court, which adjudged the occupation tax to be void, or only reversed the judgment so far as it was against the defendant company, since that company alone appealed, is dis-

City of Lincoln v. Lincoln Gas & Electric Light Co.

cussed in the briefs, but that question seems to be immaterial so far as the point here involved is concerned, since the supreme court recited the judgment of the lower court, which enjoined the enforcement of the occupation tax, and directed that the validity of the occupation tax should be investigated and reported upon by the master, and that the injunction granted by the court against the enforcement of the occupation tax should be continued until the final determination of that case. Counsel for the city contends that the validity of the occupation tax depends upon the Constitution and laws of this state, and that the decision of the federal courts upon such question is not binding upon the courts of this state. The federal courts will not entertain cases that are purely local and depend entirely upon the proper construction of the laws of the state; and, while the state courts seldom disregard the opinions of that high tribunal even upon local laws, still such decisions are not absolutely binding as precedents upon the courts of the state. But when the force and construction of the law of the state are involved, although incidentally, in litigation in the federal courts, the decision of that court is conclusive between the parties in that litigation, and the question so involved, if necessarily decided by the court, is *res judicata* between the parties thereto.

The dollar gas ordinance and the occupation tax are so closely related that the former cannot be adjudicated without a consideration of the validity of the latter. The federal courts have so regarded it, and have assumed jurisdiction to determine the validity of the occupation tax ordinance, and we are not prepared to say that it was beyond their jurisdiction so to do. It follows that the plea in abatement in the lower court should have been sustained.

The judgment of the district court is reversed and the cause remanded, with instructions to continue the

Johnston v. Delano.

case until the final determination of the litigation in the federal courts.

REVERSED.

ROSE, J., not participating.

LETTON, J., dissenting.

These ordinances were not involved in the issues in the case in the United States court. I think the state court should determine the validity of the ordinances, and that there is no valid reason for declining to pass upon the merits of this appeal.

ARCHIBALD L. JOHNSTON, ADMINISTRATOR, APPELLEE,
v. FREDERICK A. DELANO ET AL., RECEIVERS,
APPELLANTS.

FILED JULY 1, 1916. No. 18869.

1. **Railroads: ACTION FOR DEATH: CONTRIBUTORY NEGLIGENCE.** "The act of a party in going upon a railroad crossing without first listening and looking for the approach of a train, without a reasonable excuse therefor, is such as permits of no other inference than that of negligence; and if such failure to look and listen contributes to the party's injury he cannot recover." *Omaha & R. V. R. Co. v. Talbot*, 48 Neb. 627.
2. ———: ———: ———. When two persons of equal authority are riding in a vehicle which is driven upon a railroad track in front of an approaching train in full unobstructed view, it is immaterial which of the parties is driving, since, if either party looked and listened, he must have seen the approaching train.
3. ———: ———: ———. A railroad company may run its train whenever necessary in the conduct of its business, and travelers at a private crossing are guilty of negligence if they assume to know when the trains will be run, and so fail to look and listen before crossing.
4. **Negligence: ORDINARY CARE: PRESUMPTION.** There is no presumption of ordinary care induced by the instinct of self-preservation when there is evidence of negligence.

Johnston v. Delano.

5. **Railroads: ACTION FOR DEATH: CONTRIBUTORY NEGLIGENCE.** If the circumstances and conditions proved are such that one who looked and listened before driving upon the tracks must necessarily have seen an approaching train, the conclusion necessarily follows that in attempting to cross the tracks he did not observe those precautions, and was guilty of negligence.
6. **Negligence: "LAST CLEAR CHANCE."** The rule of the "last clear chance" is based upon the idea that, when any person is in a place of danger, whether negligent or not, one who knows, or who might know, and under the circumstances ought to know, of the danger, must use every precaution to avoid injuring him.
7. **Railroads: ACTION FOR DEATH: "LAST CLEAR CHANCE."** In the absence of proof of opportunity to avoid injuring such person after his danger was discovered, or ought to have been discovered, there is no reason for the application of the "last clear chance" doctrine.

APPEAL from the district court for Douglas county:
CHARLES LESLIE, JUDGE. *Reversed.*

John L. Webster and James L. Minnis, for appellants.

Earl R. Ferguson, C. R. Barnes and Harry W. Shackelford, contra.

SEDGWICK, J.

Ralph Johnston and his father's hired man were crossing the defendants' railroad with a team and wagon, and the wagon was struck by an engine and both the occupants of the wagon were almost instantly killed. The plaintiff brought this action, as administrator of the estate of his son, Ralph Johnston, in the district court for Douglas county, and recovered a judgment, from which the defendants have appealed.

Extensive briefs have been filed by both parties and many questions are presented and discussed, but it seems that there are two controlling questions upon which the decision of the case must depend. The defendants contend that the plaintiff cannot recover because of the negligence of the deceased. The deceased, about 13 years of age, and Andy Johnson, a man of middle age, who was in the employ of the father of the deceased,

Johnston v. Delano.

went with a team and wagon across the tracks of the defendants to a slaughter-house and obtained a load of fresh meat. Returning with it, they drove by the usual way along the line of the defendants' track about 300 feet to a private crossing, where the accident occurred. There was a fence between the way they took and the railroad track, and when they came to the private crossing they turned through a gate in the fence and drove about 50 feet upon the railroad track, and the wagon was there struck by the train. The train had just passed through the little town of Blanchard, and approached this crossing at a speed of about 45 or 50 miles an hour.

It seems to be conceded that there was no building or other obstruction which would interfere with a free view of the track upon which the train was approaching for a distance of over a quarter of a mile from the crossing where the accident occurred, except two trees, which could not wholly obstruct the view of an oncoming train, and which were about 40 rods from the crossing. "The act of a party in going upon a railroad crossing without first listening and looking for the approach of a train, without a reasonable excuse therefor, is such as permits of no other inference than that of negligence; and if such failure to look and listen contributes to the party's injury he cannot recover." *Omaha & R. V. R. Co. v. Talbot*, 48 Neb. 627.

The plaintiff contends that the deceased was not guilty of contributory negligence, because "Ralph and Andy, driving north along the lane to the crossing, would be going directly against whatever wind was blowing, the natural tendency of which would be to cause their eyes to water and impair their vision. Turning into the driveway, and looking down the track, they would be looking almost directly into the sun, the reflected glare of which from the snow which covered the ground would be blinding. The train was running an hour and a half behind its regular schedule time. The

Johnston v. Delano.

steam and frost which almost enveloped the train would tend to make it almost invisible against the background of newly fallen snow. The fact of the snow being on the ground would tend to muffle the sound of the approaching train, and this sound would be further retarded by the fact that whatever wind there was, was blowing directly against it. The fact that the I. & S. W. engine had been for an hour or more switching cars back and forth in the yards near the rolling mill and depot would tend to cause confusion as to the identity of the train, even if it could be seen in the distance. The steam exhaust escaping from the rolling mill across the track would tend to further obscure the train. The rumbling of the mill and the sound of the exhaust would tend to confuse the hearing and make it difficult to distinguish the sound of an approaching train."

The rolling mill and depot referred to were more than a quarter of a mile from the crossing. If the steam and frost enveloped the train, and was approaching in a mass at the rate of 45 miles an hour, that of itself would suggest danger. It is incredible that, if either of these parties had seen such a condition, he would have failed to know and declare the danger. That the cold wind in their faces or the glare of the sunshine upon the snow should prevent them from seeing the approaching train is likewise incredible. The train was running directly against the wind, and it is, of course, impossible that its own steam and smoke should precede the train and hide the approaching engine.

There is some evidence tending to show that it is probable that the hired man was driving the team; but that seems to be immaterial. If either party had looked and listened, and had given the natural warning, the accident would have been avoided. The train was late an hour or more, and this may have added to their feeling of security, and may have been one of the causes inducing their negligent conduct. But the defendants might run their train whenever necessary in the conduct

Johnston v. Delano.

of their business, and travelers at a private crossing are guilty of negligence if they assume to know when the trains will be run and so fail to look and listen. There is no presumption of ordinary care induced by the instinct of self-preservation when there is evidence of negligence. The evidence shows that they recklessly drove upon the track without any precaution, because, under the circumstances and conditions shown to exist at the time, if they had looked and listened, they must have observed the approaching train. They were therefore guilty of contributory negligence which was the direct cause of the accident.

There is not room for the application of the "last clear chance" doctrine. That rule of law is based upon the idea that, when any person is in a place of danger, whether negligent or not, one who knows, or who might know, and under the circumstance ought to know, of the danger, must use every precaution to avoid injuring him. These parties were driving along the farther side of a fence which marked the limits of the company's right of way. There was no indication that they would attempt to cross the track in the way of the oncoming train, until they turned through the gate, which was about 50 feet from the crossing. There is no evidence that the engineer or fireman saw them during the short time that they were driving these 50 feet, or that they were in a position where they ought, if using due care, to have seen them. In the absence of clear evidence of opportunity on the part of the engineer to avoid injuring them after their danger was discovered, or ought to have been discovered, there is no reason for the application of the "last clear chance" doctrine.

The judgment of the district court is reversed and the cause remanded.

REVERSED.

LETTON, J., dissenting.

This action is brought to recover for the killing of a boy not quite 13 years of age. The majority opinion holds

"that there are two controlling questions upon which the decision of the case must depend." The first is whether the deceased was guilty of contributory negligence, and the second apparently is the "last clear chance" doctrine. The conclusion is drawn that "the evidence shows that they (referring to Andy Johnson, a man about 50 years old, and the deceased) recklessly drove upon the track without any precaution, because, under the circumstances and conditions shown to exist at the time, if they had looked and listened they must have observed the approaching train. They were therefore guilty of contributory negligence which was the direct cause of the accident."

I cannot take the view that, as a matter of law, the deceased was shown to be guilty of contributory negligence. The train was running at a speed of 45 to 50 miles an hour. Defendants admit in their brief: "The wagon was struck by a north-bound passenger train running at a speed of *about 55 miles an hour*." It is said in the opinion "that there was no building or other obstruction which would interfere with a free view of the track upon which the train was approaching for a distance of over a quarter of a mile from the crossing where the accident occurred, except two trees, which could not wholly obstruct the view of an oncoming train, and which were about 40 rods from the crossing." The trainmen, therefore, could have seen that distance. At the rate the train was moving, the team must have been approaching the track at a right angle when it was a quarter of a mile away. If the train were running at a speed of 45 miles an hour, it would only take about one-third of a minute to run a quarter of a mile.

The deceased was large for his years, but his judgment, care and discretion should be measured by the fact that he was in the sixth grade at school, which is the ordinary grade for a boy of his age. There is no presumption that a child 14 years of age has such discretion, care and prudence as an adult. *Ittner Brick Co. v.*

Johnston v. Delano.

Killian, 67 Neb. 589. And the question whether a child has been guilty of contributory negligence is ordinarily one to be determined by the jury. *Breedlove v. Gates*, 91 Neb. 765. There is no rule of law which will impute to a child of 13 the negligence of an elderly man, who the jury had the right to infer continued to drive the team. We think it cannot be said that this boy was engaged in a joint enterprise with Johnson, who was driving the team when last seen, and who was employed by the father of the child. We have held that, if ordinary care requires the giving of signals by a railroad engineer on approaching a private crossing, it is negligence not to give them. *Chicago, B. & Q. R. Co. v. Metcalf*, 44 Neb. 848.

The train was late, and was running at an unusual rate of speed. The fireman testifies that he stopped ringing the bell when he left the mill crossing, and was engaged in putting in a fire until after the accident occurred, so it is clear no bell was ringing for 1,620 feet before the accident. He also said he based his answer that he rang the bell upon the fact that on approaching crossings that was his habit. He ceased to look out when he stopped ringing. The last whistle was blown at the depot, which was about 2,300 or 2,400 feet to the south of the crossing, the wind blowing from the north. The engineer testified that from the time he left the mill crossing until he reached the private crossing he would not be able to see persons driving along the lane on the left-hand side, and could not see anything on that side until it came almost directly in front of the locomotive. It is apparent, therefore, that all vigilance ceased at the mill crossing.

In this state of facts I think the views expressed by the supreme court of Iowa in the case of *Johnston v. Delano*, an action brought by the father of deceased to recover for the same death, reported in 154 N. W. (Ia.) 1013, are correct. There is a difference in the applicable law of the two states in this: That in Iowa

Roberts v. State.

there is a presumed incapacity for contributory negligence in a child under the age of 14, while in this state the rule is as before stated. This, however, does not affect the conclusion. In my view, the case involves disputed questions of fact which required submission to the jury.

MORRISSEY, C. J., concurs in this dissent.

ROY ROBERTS V. STATE OF NEBRASKA.

FILED JULY 1, 1916. No. 19199.

1. **Criminal Law: PUBLIC TRIAL.** The statute requires criminal trials to be held in the court-room provided by the county board. Rev. St. 1913, sec. 1162. The law requires that trials be public, but this requirement is satisfied by admitting those who could conveniently be accommodated in the court-room where the law requires such trials to be held, without interrupting the calm and orderly course of justice.
2. —: **PLACE OF TRIAL.** It is not proper to adjourn a criminal trial for a capital offense from the regular court-room to the stage of a public theater, without sufficient cause for so doing, the theater itself being filled with people, and under some circumstances may be so prejudicial to defendant as to require a reversal.
3. —: **SEPARATION OF WITNESSES.** The separation of the witnesses in a criminal trial is ordinarily a matter within the discretion of the trial court, but when requested, especially in a trial for felony, it is seldom denied. When the witnesses for the prosecution are near relatives, or are or have been recently so associated that it is not improbable that some of them may be under the influence of another witness who is interested in the prosecution, it is erroneous to allow such witnesses to be present and hear each other's testimony, against the objection of the defendant.
4. —: **ATTORNEY AS WITNESS.** It is improper to allow one who testifies as a witness to the principal facts in the case to also as attorney conduct the trial in the examination of witnesses and argument to the jury. But the judgment will not necessarily be reversed because an attorney at law, who is a witness in the case, is allowed to assist the prosecuting attorney in the preparation and in the details of the trial.

Roberts v. State.

5. **Witnesses: COMPETENCY OF INFANT.** When a child seven years of age is offered as a witness, it is the duty of the court to examine her, alone if necessary, as to her competency, and the sound judicial discretion of the court in allowing or refusing to allow her to relate to the jury the facts within her knowledge will not ordinarily be interfered with by this court. It is erroneous to take the unsworn statements of an interested party as to the qualifications of such witness and exclude her testimony without examination by the court.
6. **Criminal Law: MISCONDUCT OF JURY.** In a trial for felony, if the bailiff in charge of the jury, with the help of some of the jurors and without the order of the court, removes a quantity of miscellaneous articles, of which some as exhibits have been received in evidence, and some have not, from the court-room to the jury-room, and such articles are there examined and considered by the jury in arriving at their verdict, such conduct will vitiate the verdict, and a new trial should be awarded.

ERRORS to the district court for Lincoln county:
HANSON M. GRIMES, JUDGE. *Reversed.*

James T. Keefe, for plaintiff in error.

Willis E. Reed, Attorney General, *Charles S. Roe* and *George N. Gibbs*, *contra.*

SEDGWICK, J.,

Defendant was convicted in the district court for Lincoln county of murder in the first degree. The jury fixed the penalty at death, and he prosecuted error to this court. He is charged with having killed Vernon Connett on August 2, 1914. Connett was a young farmer whose home was at Bird City, Kansas. Mrs. Connett had not been in robust health, and her physician advised that she live in the open air. Accordingly the Connett family left their home in Kansas and drove across the country, living in a covered wagon, and intending to visit some relatives in this state. They arrived at North Platte July 31, 1914, where, by chance, they met defendant. A friendship appears to have rapidly developed between the two men. Defendant's mother and her husband, Charles Clayton, were employees on a ranch

Roberts v. State.

situated about five miles northwest of the city of North Platte. Defendant, together with Connett and his wife and baby, drove to this ranch, arriving about 5 o'clock in the evening. They camped there for the night, and the next day Connett determined to seek work in the neighborhood and to send his wife and baby to their people by rail. Defendant and the Connett family drove to the city of North Platte, where Mrs. Connett and the baby took the train for Mason City. Defendant and Connett then returned to the ranch. They remained there that night and until some time the following afternoon. So far there seems to be no conflict in the evidence. Connett was killed, and this defendant disposed of Connett's property, and did other things and conducted himself generally so as to leave no doubt that he had a part in the tragedy that resulted in the death of Connett. Defendant was about 22 years of age at the time of the alleged crime. He had been convicted of robbery and sentenced to an indeterminate term in the penitentiary, but prior to the date charged in the information, had been released from the penitentiary on parole. Clayton was also a paroled convict, and the defendant's mother had been living with Clayton for several years as his wife. Clayton and his wife were at first arrested for the crime, but, so far as the record shows, they were not prosecuted. The questions to be tried were whether the crime committed was premeditated murder to obtain the property that Connett had with him and calling for the death penalty, or whether the killing was done in a quarrel and the appropriation of Connett's property was an after-thought so that the crime was of a less degree. Was the crime committed by this defendant alone, or was the fatal blow struck by Clayton, making him the principal and his wife and the defendant accessories thereto? According to the testimony for the state, defendant and Connett drove away from this ranch about 4 o'clock Sunday afternoon, saying that they were going to the neighborhood of

Hershey, where they expected to find work, and Connett was never again seen alive.

The evidence, if true, would relieve Mr. and Mrs. Clayton from suspicion. The defendant's testimony was that while they were at the ranch an altercation arose between himself and Connett which resulted in Connett's knocking defendant down, and while Connett was continuing his attack and was leaning over defendant attempting to choke him, upon defendant's cries for help, Clayton rushed to the scene and struck Connett several blows upon the head which caused his death. He says that Clayton first removed the body, and afterwards he and Clayton planned the disposition of the body and the property of Connett. Defendant disposed of the property, and says that he divided the proceeds with Clayton. He is to some extent corroborated in this. It is shown that he received gold coin for some of Connett's property. Clayton testified that he did not receive any of the property or the proceeds thereof, and also testified that he had not had any gold coin from any source. There was some evidence that soon after Connett's disappearance Clayton paid a \$5 gold coin for liquor at a saloon.

When such a crime as this is committed, so dangerous to the safety of society, it is of the highest importance to ascertain the truth of the case, to establish the real character of the crime, and fix the responsibility upon the guilty party. Unfortunately for the interests of humanity it is not always possible to do this. The greatest criminal is often able to divert attention from himself, and to turn the vengeance of the public against one who may not be free from guilt, but who is less guilty than himself. It too often happens that the one least guilty, or perhaps even entirely innocent of the crime, is made to bear the punishment therefor, and so satisfy the sense of justice of the community, too readily convinced in the eager and laudable desire to see the crime properly punished. For these reasons, the

Roberts v. State.

Constitution and laws have provided certain regulations for the trial of persons charged with crime intended to prevent the terrible mistake of allowing the guilty to escape punishment through a mistaken belief on the part of the public and the authorities that justice had been done. According to the defendant's testimony, there were four living witnesses to the crime besides the defendant himself, Mr. Clayton, his wife, Mrs. Clayton's little girl, and a boy about 17 years old named Jones. Clayton and the boy testified to the essential facts relied upon as fastening the guilt upon the defendant. Mrs. Clayton was called only in rebuttal to explain an incident which it was claimed indicated her participation in the crime. The little girl was offered as a witness by the defendant, but was excluded by the court. And so we do not have the evidence of either Mrs. Clayton or the little girl, both of whom were present and witnessed the crime, according to the defendant's version.

The court removed the trial from the court-room to the theater, and stated as a reason therefor: "By reason of the insufficiency of the court-room to seat and accommodate the people applying for admission, and also by reason of there being some question as to the safety of the building crowded to its full capacity as it is, it is by the court ordered that the further trial of this cause be had at the Keith Theater, and thereupon the court was adjourned to Keith Theater, where trial proceeded." The stage was occupied by court, counsel, jury, witnesses, and officers connected with the trial. The theater proper was crowded with curious spectators. Before the trial was completed it was returned to the court-room and concluded there. At the adjournment of court on one occasion the bailiff announced from the stage: "The regular show will be tomorrow; matinee in the afternoon and another performance at 8:30. Court is now adjourned until 7:30." The court manifested no disapproval of this announcement. The defendant now insists that such proceedings were pre-

Roberts v. State.

judicial to the calm consideration of his cause to which he was entitled.

The law requires that trials shall be public, but this requirement is satisfied by admitting those who could conveniently be accommodated in the court-room where the law requires such trials to be held (Rev. St. 1913, sec. 1162), without interrupting the calm and orderly course of justice. This young man was already a convict. Did the jury infer from these, and other similar transactions, that it was immaterial in what manner the defendant was tried; that it was not necessary to take great pains in weighing the evidence against a convict who by his own admissions had violated the law? It is not clear that the defendant was not prejudiced by these proceedings.

The defendant demanded that the state's witnesses be separated so as not to hear each other's testimony. In some jurisdictions this is a matter of right. 1 Greenleaf, Evidence (16th ed.) sec. 432, says: "This order, upon the motion or suggestions of either party, is rarely withheld." *Binfield v. State*, 15 Neb. 484. In our state it has been considered to rest in the discretion of the trial court. This court has said that the practice of so separating the witnesses "is a good one, as it tends to elicit the truth and promote the ends of justice." *Chicago, B. & Q. R. Co. v. Kellogg*, 54 Neb. 138, 141. So far as we now recollect, the court has never suggested what would amount to an abuse of discretion in that regard. To have separated these witnesses would seem to have been peculiarly appropriate in this case. It was urged that the witness Johnny Jones was of weak mind and under the influence and control of Clayton, with whom he worked. Clayton testified to a condition which would relieve himself of all guilt and place the awful responsibility for this crime upon the young man. The boy Jones reiterates the story of Clayton in all its details, and so the evidence of Roberts is overborne, and it is supposed to be established beyond a reason-

Roberts v. State.

able doubt that Roberts is alone responsible for the death of Connett. Such conditions call for the separate examination of the witnesses, and this court has never held that it is not an abuse of discretion to deny the request under such conditions. The reason given by the court for refusing to separate the witnesses was stated upon the record: "The temperature ranging about zero, and by reason of the fact that there is no place where witnesses can be kept, for the want of proper and suitable conveniences, the application is denied." There were no conveniences at the theater to enable the court to conduct the trial in the regular and ordinary manner. The rights of the defendant were prejudiced, and this was made necessary principally because of the unauthorized removal of the trial from the court-room.

Edward G. Maggi, of the state board of pardons, who is also a member of the bar, was appointed by the court to assist the county attorney in the prosecution. Mr. Maggi was active in obtaining evidence and was an important witness in the case. Ordinarily it is not expected that the attorney in the case will be also a principal witness. Trial lawyers of experience hesitate to act as witnesses and active counsel in the trial unless under unusual circumstances it becomes necessary to identify some writing or supply some formal proof of a matter peculiarly within the knowledge of counsel as such. To discuss in argument the reliability and weight of one's own evidence is embarrassing to counsel, and sometimes confusing to jurors. In this case, however, the part taken by Mr. Maggi in the trial does not seem to have been inconsistent with his position as a witness or his interest as an officer of the state.

The little girl offered by the defendant as a witness was a little less than seven years of age. The defendant asserts that if she were allowed to testify her evidence would satisfy the jury that Clayton and his wife, who were first arrested for the crime, were the prin-

cipal criminals; that they directed him in disposing of Connett's property and shared in the proceeds. The court, without himself examining the little girl, left it substantially to Mrs. Clayton to determine whether she be allowed to testify, and it is urged that Mrs. Clayton, not being under oath, and having reasons to fear that the evidence offered would convict her of crime, advised that the girl was not competent. The judge then informed the jury:

"Gentlemen, this is a child. She has not reached the age of seven years. She has not gone to school to exceed three months. We all know that at that immature age children get ideas from suggestion. To the court's mind it would be cruelty to attempt to force a child of that immature age; she doesn't know or understand any of the obligations of the oath, and therefore the court will not permit her to be put upon the stand, because of her immature age and because of her inability to understand and know the obligation of an oath. The child is of that immature age that as soon as the suggestion is made that she come upon the stand, even though accompanied by her mother, she breaks down and cries through fear, and this takes place in the court's presence and hearing."

A little child is generally supposed to be likely to tell the truth, and the trial court will not usually reject her evidence without first examining her as to her intelligence and understanding. To examine another person who may have the strongest motive to prevent the child from telling the jury just what took place, and to exclude the child's evidence because of the say-so of the interested person so examined, is not the usual practice. It is not strange that the child was frightened. She was perhaps not accustomed to taking part in a state performance before a theater full of curious and excited people. If she had been encouraged by the court in the quiet and order of the usual trial court-room, separate and apart from the other witnesses, and free from

fear of those interested parties who for their own protection may have tried to overawe her in advance, she might possibly have convinced the court that she had a clear remembrance of the whole transaction in question, and that she could relate it in such a way as to greatly assist the jury.

After the case had been submitted to the jury, and in the absence of the judge, and without his order or knowledge, the bailiff permitted some of the jurors to leave the jury-room, and go to the court-room, and there, with the help of the bailiff, they gathered exhibits including as it is alleged, "a certain skull, a jaw-bone, the partial skeleton of a hand or some fingers, several shirts, a hat, cap, two or three pairs of trousers, a pair of shoes, belt, a post card one photograph of the alleged place where the alleged body was supposed to have been found, one white dress and a skirt belonging to Mrs. Clayton, * * * one bed comforter, together with some alleged human hair, and a suit case, and a photograph purporting to be a family photograph of the Connett family," of which some had been received in evidence, and some had not, and took them to the jury-room, and there discussed the bearing of these promiscuous articles upon the probability of guilt of the defendant. This transaction requires no discussion. It is universally held that such misconduct requires a reversal.

It is also complained that a juror had before the trial stated his positive opinions as to the guilt of defendant, but denied upon his *voir dire* examination that he had formed or expressed any such opinion; that one of the jurors in the jury-room stated important matters as facts, and drew a "map" of the locality of the crime, which showed different measurements and distances than those testified to by the witnesses, and otherwise misled his fellow jurors; that the bailiff talked with the jurors while they were considering their verdict. But these, and some other matters complained

Roberts v. State.

of, will not be likely to affect another trial, and it seems unnecessary to discuss them at length. The defendant has been unfortunate in his home life, or rather in his lack of a home, and in his vicious surroundings. His mother was living with Clayton, a convict of mature years, as his wife. If defendant is not guilty as charged, this man Clayton was the cause of Connett's death. It is of the highest importance to determine, if possible, the truth of the matter. At all events, in view of the manifold errors indicated, this court cannot say that there has been a trial as the law requires, and the judgment is reversed and the cause remanded for further proceedings.

REVERSED.

ROSE, J. I concur in the reversal of the conviction on two grounds: (1) There was prejudicial error in the transferring of the place of trial from the court-house to the opera house and in the resulting conduct at the latter place. (2) Failure of the trial court to interrogate the child offered as a witness on behalf of defendant and the order preventing her from testifying without a proper inquiry into her capacity to testify require a new trial.

MORRISSEY, C. J., dissenting.

According to the testimony for the state, defendant and Connett drove away from the ranch about 4 o'clock Sunday afternoon, saying that they were going to the neighborhood of Hershey, where they expected to find work. The following morning defendant drove Connett's team and wagon to a livery stable in Hershey. He there sold the team and wagon for \$250, executed a bill of sale therefor, and signed thereto the name "Vernon Connett." He received in payment a check made payable to "Vernon Connett." He wrote the name "Vernon Connett" thereon and cashed the check at a local bank. He then went to the post office and

Roberts v. State.

wrote a postal card, directed to "Mrs. Connett, Mason City, Neb." On this card he wrote: "Dear girl. Glad you are all right. Roy went to South Dakota. I am going to do some hauling. Don't write for 3 or 4 days, I won't be in town. V. C." He mailed this card to Mrs. Connett. Taking the trunks and personal baggage belonging to Connett that were in the wagon, he hired a conveyance which conveyed him and this baggage to North Platte. He there took a train to Lincoln, called on the secretary of the state prison board, made his monthly report as was required under his parole, then went to the penitentiary and reported to the warden, and after staying around the city of Lincoln a day or two returned again to the ranch where his mother was living, paid a short visit to the family and again departed. Soon thereafter a search was instituted for Connett; the postal card which defendant had mailed was discovered to be a forgery, the team was located, and it was generally understood that Connett had met with foul play. Defendant's parole was revoked and he was again placed in the penitentiary. His mother and stepfather were arrested, but, so far as the record discloses, no formal complaints were filed against them. They told a number of conflicting stories, but finally gave information which led to the discovery of Connett's body in the bed of the Platte river near the town of Hershey, in Lincoln county, January 13, 1915. Decomposition had progressed to such a degree that the body could not be identified by the features, but it was identified beyond question by the clothing, teeth, and other marks. Three puncture fractures were found in the skull, one in the frontal bone and one on either side, and the testimony shows that any of these might prove fatal. There is no direct proof as to how these fractures were produced, nor by what hand the blows were struck. The case, so far as the state is concerned, rests on the testimony of Charles Clayton, the stepfather, and Johnny Jones, a 17-year-old boy

Roberts v. State.

who worked on the ranch, corroborated by the conduct of defendant and supported by his conflicting stories. Clayton and Jones testify that defendant and Connett left the ranch together on Sunday evening, August 2, the evening before defendant sold Connett's team in the town of Hershey.

The defendant, testifying in his own behalf, admitted meeting Connett and family in North Platte, and all the incidents as shown by the state down to Sunday afternoon. His story as given on the trial is that during the afternoon he and Connett engaged in a quarrel; that Connett knocked him down and was in the act of choking him when he called for help; that his step-father, Clayton, rushed out with a hammer, struck Connett on the head, felled him to the ground, and then struck him two or three blows with the hammer, and that Connett instantly died. He then says that Clayton, Mrs. Clayton, defendant's mother, and defendant carried the body 75 or 100 yards and hid it in a clump of weeds; that later they carried the body back again, put it in a wagon, and that he drove away with this body, with directions from Clayton to hide it so as to conceal the crime, and to then proceed to Hershey and sell the team and wagon; that, pursuant to these instructions from Clayton, he took the body to the point where it was later found in the river bed; made the sale of the team, wrote the postal card, and went to North Platte, where he divided the proceeds of the team with Clayton.

This entire story is denied by Clayton. It is also denied by Jones. Jones is referred to by counsel for defendant as an idiot, and it is strenuously insisted that his testimony is not worthy of belief. Although 17 years of age, he had never advanced beyond the fourth grade in school, and he seems to be subnormal mentally. Nevertheless he tells a straightforward and convincing story. He was cross-examined at length without his testimony being shaken in the least, and

there is nothing to indicate that he had any disposition to depart from the truth.

A number of assignments are directed to the admission of exhibits. These exhibits relate to matters which the defendant later admitted in his own testimony. This was properly a part of the state's case, and their admission could not have been prejudicial.

During the trial the court, on its own motion, made the following finding: "By reason of the insufficiency of the court-room to seat and accommodate the people applying for admission, and also by reason of there being some question as to the safety of the building crowded to its full capacity as it is, it is by the court ordered that the further trial of this cause be had at the Keith Theater, and thereupon the court was adjourned to Keith Theater, where the trial proceeded"—and transferred the trial from the Lincoln county courthouse to the Keith Theater in the city of North Platte. There the court, attorneys, witnesses, and jury were seated on the stage, and the body of the house was filled with spectators. Defendant's counsel objected to the transfer of the trial, and also objected to the seating of the witnesses for the state on the stage, and asked that they be excluded from the room during the trial. His objections and motion were overruled; the court saying that there were no adequate accommodations for the witnesses elsewhere.

During the progress of the trial the court bailiff made the following announcement from the stage of the theater as court was about to take a recess: "The regular show will be tomorrow; matinee in the afternoon and another performance at 8:30. Court is now adjourned until 7:30." This announcement of a show did not refer to the trial, but to an exhibition to be given by a troupe of professional actors, and it seems to be conceded that the arrival of this show troupe necessitated the surrender of the theater, and that thereafter the trial was conducted in the courthouse.

The administration of justice ought not to be confused or confounded with shows and entertainments. The trial ought to have been conducted in the courthouse with the decorum becoming a judicial investigation where a defendant is on trial for his life. However, after carefully reading all of the testimony, I find the evidence of defendant's guilt so strong that I cannot concur in an opinion that sets aside the verdict of the jury merely because the court, in this respect, turned aside from the beaten path of judicial procedure.

In addition to the witnesses who testified for the state, there were present at the ranch on that Sunday afternoon defendant's mother and his half-sister, Nellie Roberts, a child then just past six years of age. Defendant's mother was not called as a witness by either side as to what occurred at the ranch, but defendant asked to have the little girl called as a witness. Thereupon the court interrogated the little girl's mother, but without putting her under oath, and elicited the information that the child had gone to school two or three months, and that she had attended Sunday school "part of the time," and then, turning to the jury, the court said: "Gentlemen, this is a child. She has not reached the age of seven years. She has not gone to school to exceed three months. We all know that at that immature age children get ideas from suggestion. To the court's mind it would be cruelty to attempt to force a child of that immature age; she doesn't know or understand any of the obligations of the oath, and therefore the court will not permit her to be put upon the stand, because of her immature age and because of her inability to understand and know the obligation of an oath. The child is of that immature age that as soon as the suggestion is made that she come upon the stand, even though accompanied by her mother, she breaks down and cries through fear, and this takes place in the court's presence and hearing."

Thereupon counsel for defendant offered to call witnesses and have them examined relative to the competency of the child, but the offer was denied. He then offered to prove by the child that a fight occurred at the ranch substantially as detailed by the defendant. This offer was also denied, and the ruling of the court is assigned as error.

"No fixed rule can be laid down as to the age a child must be to entitle it to testify as a witness in a court of justice. The question of competency of a person to be a witness must be left to the sound legal discretion of the trial judge, leaving to the jury to determine the credit that ought to be given to the testimony." *Davis v. State*, 31 Neb. 247, 255.

The court has made a specific finding as to the appearance and conduct of the child, and in the exercise of that sound legal discretion which is vested in the trial judge has excluded the testimony. The mother of the child was present and might have been called to prove the same matters sought to be proved by the child. It nowhere appears that she was unfriendly to the defendant, nor is any reason given for not calling her. It was suggested in argument that she might conceal the truth in order to protect her husband, but we can hardly indulge the belief that this woman, who was then living with her third husband, would conceal the truth to protect the husband, when its concealment might send her son to the electric chair.

Of the court's refusal to exclude the witnesses from the stage of the theater, it may be said that the instant case is peculiar in that the major portion of the testimony is undisputed. The usual danger of a witness being influenced by the testimony of another witness where he is permitted to remain in the courtroom and hear the examination was not present, and under the circumstances the court was not

guilty of such an abuse of discretion in this regard as calls for a reversal of the judgment.

After the jury had been instructed and retired to the jury-room, they called upon the bailiff for exhibits that had been offered in evidence. The bailiff then permitted a number of jurors to go into the court-room proper, where the exhibits had been left, and he, together with these jurors, gathered up the exhibits and carried them to the jury-room. Among these exhibits was deceased's skull, and a shirt which was found on the body when it was discovered. In support of a motion for a new trial, defendant set out an affidavit of a juror, in which it was alleged that the jurors, after having procured these exhibits, attempted to fit the shirt over the skull, and so arranged it as to bring a hole in the shirt over a hole or fracture in the skull, and that from their experiments with these exhibits they reached the conclusion that, as deceased was disrobing and had his shirt pulled over his head, he was struck and killed by the defendant, thus disproving his story of the fight at the ranch. The exhibits had been offered and received in evidence. The defendant by his own story had sufficiently identified them. The skull is shown to have been found in the river bed where defendant testified he put the body of deceased. The marks it bore were such as corresponded to his theory of the killing, and the issues had been narrowed down to the point where the jury were left with practically nothing to determine but the time, place, and person who did the killing, was it at the ranch in the afternoon, and were the blows struck by Charles Clayton, or was it some time during the succeeding night, and were the blows struck by the defendant. An examination of the exhibits could not work to his prejudice.

When we consider the numerous conflicting stories told by the defendant, stories which he now admits

Roberts v. State.

to be untrue, together with his disposition of the deceased's property, the writing of the postal card to the widow, and the unreasonableness of the story he told at the trial, it seems to the writer that his guilt was fully proved. A heinous crime has been committed; all the facts and circumstances bearing on its commission have been submitted to a jury; defendant was represented by able and zealous counsel; a verdict in harmony with the evidence has been returned; a judgment that fits the crime has been pronounced; and that judgment ought not to be set aside for technical errors that do not affect the substantial rights of the defendant.

BARNES, J. I concur in this dissent.

HAMER, J., dissenting.

The witness Johnny Jones testified that on Sunday the defendant, Roy Roberts, and the deceased, Vernon Connett, hitched up the team and drove away together. That was the last time that Johnny Jones saw Connett. A peculiar thing about Connett and the defendant going away together is, that the defendant just before they went kissed his mother and little sister good-bye. It looks as if this starting away together was the beginning of the journey of the deceased to his grave. Mrs. Connett appears to have sufficiently identified the body of her husband, who was buried not far from Sutherland, by his clothing and his teeth. The clothing was also identified by R. H. Connett, the brother of the deceased. The defendant appears to have succeeded in getting the deceased to go to the Sund ranch with him. His stepfather and his mother and little sister resided there.

On the 3rd day of August the defendant appears to have executed a bill of sale for the team, harness and wagon. He signed the name "Vernon Connett" to the bill of sale. The bill of sale is made to one W. H. Jenkins. Oliver H. Ireley, a banker residing at Hershey,

Nebraska, made out the bill of sale, and he identified the defendant as the man who signed it. The consideration was \$250. This witness testified that he saw the instrument delivered to the defendant, who was then claiming to be Vernon Connett. The defendant was recognized by Mr. Ireley. Jenkins paid for the team and wagon with a check on the Bank of Lincoln County. The check was presented to the bank by the defendant claiming to be Vernon Connett, and was cashed by the bank; the defendant receiving the money. The payment was in gold. The horses, wagon and harness all belonged to the deceased. The defendant testified to being sentenced to the penitentiary for 15 years. The trial was at Grand Island. He was paroled. He also testified that his sister is in the reform school. The stepfather appears to be a convict paroled from the Nebraska penitentiary.

On Friday morning at North Platte the defendant first met the deceased, and visited him so industriously that by 2 o'clock in the afternoon they started for the Sund place. There were in the wagon the deceased, Connett, and his wife and baby, and also the defendant. Sund's place is described as about four or five miles northwest of North Platte. On their way out there a burr dropped off the axle of the wagon. They were unable to find it. With more or less trouble, because the wheel would not stay on, they finally succeeded in driving to the Sund place. That evening the defendant visited with his mother and little sister, but the deceased's wife cooked supper by a fire that was built near the wagon, and the defendant ate supper with the Connetts. That night the defendant's mother loaned him some bed clothes and he made a bed on the ground not far from Connett's wagon. In the morning the defendant visited with his stepfather a short time, and then spoke to his mother and little sister, but after that he went back to the wagon, and when the Connetts got breakfast ready he ate with them. Defendant stayed continuously with Connett. Mrs. Connett borrowed a wash-boiler and wash-board of the de-

Roberts v. State.

defendant's mother. She then did her washing at the southwest corner of the house. The defendant borrowed his stepfather's razor and made some lather and shaved Connett. They appear to have had a good dinner together, because two chickens were killed and cooked, and there were noodles. Then they hooked the team up to one of Mr. Sund's wagons and took Mrs. Connett to the Union Pacific depot in North Platte. It was from there that she started to Mason City. This then left the defendant alone with Connett, so that nobody might disturb him. For the last time Mr. Connett kissed his wife and baby good-bye. Then he and the defendant started for Sund's place. Arriving there, they unhitched the horses and went into the house. The defendant went with Connett and helped him to take the blankets out of his wagon and to hang them up so that they might dry. Then they had a lunch together by themselves—just these two. The defendant appears in the evening to have entertained Connett by acting the part of a ghost and scaring young Jones, who had gone into the cornfield to wait until the snipes would drop into the bag which he held. This sort of performance enabled the defendant to divert and amuse Connett. The defendant and Connett slept in Connett's wagon that night. In the morning the defendant and Connett both ate breakfast with the defendant's mother. Their clothes had been drawn out of shape by the rain of the day previous, and the defendant borrowed a flat-iron of his mother. He pressed a pair of pants for Connett, and also a pair for Clayton, and one pair for himself. The defendant testified that while they were there Mr. Harding came, and that they all conversed with him as to whether he knew where Connett could find employment such as working in the hay-field with the team. From and including this testimony it is well to inquire how many of the alleged facts were manufactured by the defendant for himself for his own personal benefit. But defendant testified: "We were speaking of people in general, that is, fellows

that we had associated with, and as to their character and different things of that sort, and it seems as though Clayton wanted to leave the impression with Harding that he was quite a rounder. He said several things in regard to his ability as a bad man; even spoke of riding bad horses in Cheyenne, Wyoming, and at one time there a man cut the 'let-go,' I believe he called it, of his saddle, and after cutting the let-go of his saddle, which he claimed at that time would have meant that he would have won the championship, if it hadn't been cut, of the frontier day at that time, he claimed, that after the let-go broke he was carrying, I believe, a 45 Colt's revolver, which, after the let-go broke and threw him, he immediately pulled out." This is apparently the beginning of the defendant's plan of presenting Clayton as a violent and vicious sort of man. After Harding went away Clayton, Connett and the defendant went back to Connett's wagon, so defendant testified, and they sang some songs. After that they went into the house and had dinner. The defendant testified that after dinner was over he and Clayton got into an argument in regard to the defendant's mother, and that Clayton said that if the defendant's mother ever left him, or did him as she had others, he would shoot her. Then the defendant says that he told Clayton that if he (Clayton) did anything of that kind he "would have to shoot me on sight, and he said something about he didn't think that would be hard to do; and I don't remember just exactly what I said, but I said something to the effect that I had a notion to hit him then, and I think I called him a name, I am not just exactly positive, and Mr. Connett stepped up and said, 'If there is any fighting to be done here, I will do it.'" The defendant further testified that he turned around to Connett and said to him, "What are you butting in for?" and that Connett then said he thought he had a right to butt in; and the defendant then testified that he said to Connett, "You ———, I'll hit you in the nose."

This story up to this point is unnatural and improbable in the extreme. Connett, according to the story, had been invited into the house with the defendant, and they had eaten their breakfast and dinner together in the house. There had been no sort of controversy. Besides, if the deceased, Connett, was friendly to the defendant, as he appears to have been, and very much dominated by him, which seems to have been the fact, he would not have wanted to do anything contrary to the will of the defendant. But the defendant goes right along with his improbable story: "Just about that time Connett knocked me down, and after knocking me down he put his left knee in my stomach and both hands around my neck, and while down there I told him that I had enough, that I didn't want to fight." Let us analyze that. Why should Connett have been attacked when there was no reason whatever for attacking him? And as Connett does not appear to have been struck in the nose, did he have any reason to knock the defendant down? It is unnatural that he should have done so until he was actually struck. The statement that he put his left knee on his stomach and that he put both hands around his neck is an improbable story. Defendant had the deceased put himself in an uncomfortable and untenable attitude. Men do not fight by putting their knees in each other's stomachs and then putting their hands around the neck. It cannot be done. It is true that he could have put his knee in his stomach, but he could not have put his knee in his stomach and choked him at the same time. He might have choked him at one time, and put his knee in his stomach at another time, but never could he take the position described by the defendant. This part of the story was invented for the express purpose of reducing the degree of the offense charged. That fact is still further apparent by what happens, according to the defendant: "And while down there I told him that I had had enough, that I didn't want to fight. He wouldn't quit choking me." This is an unnatu-

ral thing that he would not quit choking the defendant after the defendant told him that he had had enough, and that he did not want to fight. Men do not choke one another under those circumstances. But the last part of this unnatural story puts on it the climax of its improbability. The defendant puts himself in the position of one calling for help, and then Clayton, instead of interfering as men do interfere by taking hold of Connett with his hands and pulling him off, is represented as picking up a hammer and running over and pounding Connett on the head with it until he is dead. That is the worst part of this piece of fiction. He testified: "Mr. Clayton was standing right near the milk-house, and he picked up a hammer and ran over to where Mr. Connett was, and he hit him in the head with this hammer, and after he fell down he hit him two or three more times." Assuming that Clayton is like other men, it is fair to presume that, if there had really been a fight and that he had seen it, he would have run over and would have taken hold of the contestant who had the best of it. Instead of doing that, according to his story, he pounded him in the head with a hammer, and, to make sure that he was good and dead, he hit him two or three times after he was down. Assuming that Clayton was a natural man, he would have been appalled at once when he struck Connett with the hammer and Connett fell down, and he would have been doing everything that he could to revive him. Then the defendant was himself perfectly helpless. He says that Clayton came over to where he was, "and my legs were under the body of Vernon Connett, and he pulled me out by the shoulders. Oh, possibly three feet he moved me, after getting me out from under Mr. Connett's body, and after that I began to sit up, and Clayton says, 'What will I do?'" In the mind of the author of this piece of unreal literature the defendant was to be shown to be utterly helpless, and the big body of a man of ordinary size was lying upon him, and he had to be pulled out from under the body. But

that is not all. Right here this piece of literature proceeds to put the blame of killing the man all on Clayton, and Clayton begins to wonder what he is going to do, and he asks the defendant. He says Clayton rolled the body of the dead man over onto the blanket, and then said, "Take hold of the bottom end of that," and then they carried the body 75 or 100 yards east of Mr. Sund's house and put it into a pile of weeds. Then he draws a picture of his little sister standing near the corner, that she had a little bob-tailed dog with her, and that he took hold of her hand and led her into the house, and then the mother inquired, "What has Charlie done?" whereupon the defendant told her that Charlie had "killed that man." He then tells that Clayton called to him from the barn, and that he went to the barn, and that Clayton began to ask him what he was going to do, and that Clayton said to him, "You are going to help me, ain't you?" and that Clayton also said, "It is possible that I will have you sent back to Lincoln on your parole, and maybe a murder charge put against you; maybe I will do otherwise." He says that Clayton threatened him if he did not help him, and then that he finally said "All right." Then they led the team out of the barn and hooked them onto the wagon and took the endgate out, and then that his mother joined them at the corner of the house and from there they walked to where the body of the man was in the weeds, and "mother and Clayton took hold of the head end of the man and I took hold of the foot end of the man, and we carried him back to the wagon, and after carrying him back to the wagon we laid him down." It seems that they then put him in the wagon, according to the story, and that they had the blanket or skirt, or whatever it was, wrapped around his shoulders and head, and then he says that Clayton gave him certain directions; that Clayton told him: "After you lay this man out and bury him, or wherever you want to put him go to Hershey, Nebraska, and there sell the team if you can. After selling the

Roberts v. State.

team I will meet you in North Platte." He says also Clayton told him to write the postal card to Mrs. Connett and what to put in it. He then describes his drive to the graveyard at Sutherland, and then going to the Platte river and taking the endgate from the wagon and carrying the man just down over the bank and there laid him down, "and I took hold of this blanket or cover or skirt, or whatever it was, and I pulled it out from in under his head, and I laid this into the wagon, and I put the endgate into the wagon."

Another unreasonable thing to this story is that he has Clayton asking him what shall be done, and then Clayton does not go with him and does not in any way participate in burying the body. According to the story, the trouble was Clayton's trouble, and he should therefore have hauled the body away to hide it. Then the defendant kept the property and got the money for it when he sold it.

In the light that the defendant testified to an unreasonable and improbable story having no discoverable foundation in fact, and resting only upon a basis of fiction, formulated to deceive the jury and to reduce their verdict from murder in the first degree to manslaughter or murder in the second degree, I see no particular error in the refusal of the court to allow the little girl to testify to a story which was transparent and unreasonable fiction. If the alleged facts concerning the killing of the deceased with a hammer by Clayton never happened, then the little girl could not have truthfully told the story related by the defendant, and so the defendant did not suffer when she failed to recite this Munchausen tale. The mother was probably not called as a witness to the main facts because the defense knew that there was no truth in the story which it had put up, and did not want to subject her to the dangers of a cross-examination.

When Johnny Jones saw Connett and the defendant driving north toward the railroad tracks together, the defendant was taking Connett for his last drive. The

Roberts v. State.

man who had taken possession of Connett and who had zealously kept such possession, was going to kill and bury him. And he was going to keep the team and the harness and the wagon until he could realize their value. This was to be the pay for his trouble and his crime.

Charles Clayton testified that the defendant had said he wanted Connett's team; that on a Sunday afternoon the defendant kissed his mother and little sister good-bye, and Connett shook hands with Mrs. Clayton; that then the defendant and Connett got into the wagon and started for Hershey to work in the hay-field, so they said; that Johnny Jones was there and saw them start; that defendant was sitting on the left side and driving the team, and Connett was on the other side. When defendant came back a week afterwards he told the story that Connett had gone to South Dakota on a teaming job. Defendant at that time seemed to have plenty of money.

Clayton fixed the time when Roy Roberts and Connett and his wife and baby came to the Sund place as Friday, July 31. He also said that Roberts and Connett were there until the next Sunday afternoon, when they went away together. Clayton did not see Connett after that. When the defendant came back he talked to Clayton in such a way as to induce him to believe that there was something wrong. After that he told Clayton that he had been mighty lucky in getting out of a murder case. While Clayton himself had entered a plea of guilty to cattle stealing, there seems to be no credible evidence connecting him with the crime, and that defendant sold the team, wagon and harness while he was gone corroborates Clayton and the story of the crime.

There could be no prejudicial error in excluding the testimony of the little girl, defendant's sister, if the story about to be told was clearly highly colored fiction. The district judge was on the ground and he had the opportunity to examine conditions surrounding this trial and to judge of them. I am unwilling to condemn what he did in excluding the testimony of the little girl.

As to the action of the district court in adjourning the trial from the court-house to the theater, he probably did it with the implied or expressed approval of the county commissioners. Besides, in this country the court is an institution of the people and for their benefit. The writer looks upon the publicity of the court proceedings among the people as a good thing and much to be encouraged, except, of course, a trial should not be produced as a drama, and nothing should be added which converts the facts into a tragedy.

While I realize that the opinion of the court presents a criticism of the proceedings not entirely without some foundation, it does not follow that the things complained of are so prejudicial to the rights of the defendant as to justify a reversal of the judgment of the district court and the increased burden and expense of a new trial. While the strictest enforcement of the more technical rules of the criminal law may possibly sustain the present views of this court as set forth in the opinion, there is a growing tendency among the people, the bench and the bar to let well enough alone. In this case I am not quite able to agree with the views of the majority.

The law presumes the defendant to be innocent until his guilt is established by the evidence beyond a reasonable doubt, and this court will not affirm the judgment of the district court based upon a verdict of guilt unless the defendant has had a fair trial, and the inquiry concerning the defendant's guilt has been conducted without prejudicial error. Unwarranted injury might be done to the defendant by taking the case away from the courthouse to the theater if the theater should be filled with a hostile and demonstrative audience seeking the conviction of the prisoner. Whether the refusal of the court to let the defendant's little sister testify was based upon a sufficient reason we may not know as well as Judge Grimes, who saw the little girl cry and who perhaps heard some of her conversation. Besides, Judge Grimes conversed with the mother, and the mother appears to have given certain rea-

Rine v. Rine.

sons for not letting the little girl testify. I desire most earnestly to say nothing that shall in any way be prejudicial to the defendant. His connection with the case and his criminal liability are shown by the majority opinion, in which it is said, among other things: "Defendant and the Connett family drove to the city of North Platte, where Mrs. Connett and the baby took the train for Mason City. Defendant and Connett then returned to the ranch. They remained there that night and until some time the following afternoon. So far there seems to be no conflict in the evidence, Connett was killed, and this defendant disposed of Connett's property, and did other things and conducted himself generally so as to leave no doubt that he had a part in the tragedy that resulted in the death of Connett."

With this statement contained in the majority opinion, I am unable to see how the discussion of the case contained in this dissent can in any way be prejudicial to the defendant. I am unable to coincide with the views of the law expressed in the majority opinion, and I therefore feel called upon to insist upon this dissent.

PHILIP S. RINE, APPELLEE, v. JOHN A. RINE, ADMINISTRATOR, ET AL., APPELLEES; LOUISE STEINACKER ET AL., APPELLANTS.

LAURA RINE, APPELLEE, v. JOHN A. RINE, ADMINISTRATOR, APPELLEE; LOUISE STEINACKER ET AL., APPELLANTS.

LAURA RINE, APPELLEE, v. LOUISE STEINACKER ET AL., APPELLANTS.

FILED JULY 1, 1916. No. 19523.

1. WILLS: ORAL CONTRACT: SPECIFIC PERFORMANCE. "Where a party orally contracts to devise and bequeath to another certain real es-

Rine v. Rine.

tate and money in consideration that the beneficiary shall assume a peculiar and domestic relation to the promissor, and render him services of a character to make it practically impossible to estimate their value by any pecuniary standard, and the beneficiary, in reliance upon the oral promise, in good faith assumes the relation and fully performs her part of the agreement, she will be entitled, in the event of a breach of the contract by the promissor, to a specific performance of the same as made." *Lacey v. Zeigler*, 98 Neb. 380.

2. **Witnesses: COMPETENCY.** Counsel for plaintiff are not disqualified as witnesses under section 329 of the Code (Rev. St. 1913, sec. 7894), since neither of them has a "direct legal interest."
3. ———: ———. A witness is not disqualified merely because of the fact that he is the son of a party. Relationship to the adverse party may affect his credibility but not his competency as a witness.

APPEAL from the district court for Dodge county:
GEORGE H. THOMAS, JUDGE. *Affirmed.*

S. L. Geisthardt, for appellants.

Frank Dolezal and *E. P. Smith*, *contra.*

HAMER, J.

Carl Hembeck, a resident of Dodge county in this state, and in his lifetime an owner of considerable real and personal property therein, died in 1904, leaving no widow and without issue surviving him. He made a will which was duly probated, and which, after setting aside \$2,250 in trust for the payment of specific legacies, which were to be paid after the death of his wife, Bertha Hembeck, gave her the income from the sum put in trust and made her as well his residuary legatee. The said sum of \$2,250 was to be divided evenly between Louise Steinacker, William von Gahlen, and William Grunewald, the niece and nephews of the testator, and residents of Germany. This will was executed in 1896, Mrs. Hembeck, the wife of the testator, died about a year prior to the death of her husband.

Action was begun by Philip S. Rine in 1904, in the nature of a bill of interpleader, alleging that he was the owner of certain land in Dodge county upon which Carl

Rine v. Rine.

Hembeck, deceased, had held a mortgage, and alleging that the administrator of said Hembeck's estate claimed the mortgage and its proceeds, and that Laura Rine claimed to own the mortgage by virtue of a contract with the said Hembeck, and praying that defendants interplead and establish their right to the mortgage. Laura Rine answered, claiming the mortgage by virtue of a parol agreement with the said Hembeck to the effect that she should look after and take care of the said Hembeck and his wife, and look after their comfort during the lives of each of them; that she should receive the entire estate of the said Carl Hembeck upon the death of the survivor of the said Hembeck and his wife. Service by publication was had upon the defendants Steinacker, von Gahlen, and Grunewald, and upon default the case went to decree June 27, 1904, a decree being entered in favor of Laura Rine, and finding that she was the owner of the mortgage in question by virtue of the contract. On June 24, 1909, the defendants von Gahlen, Grunewald, and Steinacker answered and asked to have the decree set aside. In *Rine v. Rine*, 91 Neb. 248, we decided that the decree should be set aside and the defendants named permitted to make their defense. Upon a trial of the issues raised by their answers, the district court has again found in favor of Laura Rine upon the alleged contract, and the defendants have challenged the correctness of that finding by this appeal, and now allege that there is not sufficient competent evidence to support the decree.

The other cases involved herein concern the title to real estate owned by the said Hembeck. The cases were tried together and decrees rendered in all of them in favor of Laura Rine upon her alleged contract. In determining whether such a contract as that alleged was made by the parties, it is proper to consider the relations existing between them. Laura Rine was the niece of Mrs. Hembeck. Mr. and Mrs. Hembeck through the greater part of their lives were childless, no child surviving infancy. Laura Rine's mother, a sister of Mrs. Hembeck,

Rine v. Rine.

died when Laura Rine was a child about ten years of age. From that time until she reached maturity and married, her home was made with the Hembecks. This period was about ten years. Shortly after her marriage the Hembecks retired from the farm and moved into the city of Fremont. This was in 1875 or 1876. From this time until 1889 Mrs. Rine and her husband resided on a farm. Mr. Rine was extensively engaged in farming and in the stock business. During this period the relationship between the families seemed to have been as intimate as possible under the circumstances. Whenever the Rines went from the farm to Fremont the Hembeck house was made their home. Philip S. Rine testified: "Well, we drove there every time anybody came in, the first thing we drove there. * * * They would not let us go anywhere else. We made it our home when we came to town. I would put my horses in the livery barn and we would always take dinner there. Q. In the way of bringing in supplies from the farm, what was done by you folks? A. Well, whenever we came in we brought them things to eat. When we butchered I took them in a lot of meat, sausages, I always made a lot of sausages. Of course, we gave them anything we had." The Hembecks treated Mrs. Rine as their child and referred to her as their girl.

Such a contract as the one involved may be enforced when the services which are the basis of the contract have been rendered and the value of them cannot be accurately measured, and it would be unjust not to enforce the contract. Many decisions of this court have recognized this rule. *Kofka v. Rosicky*, 41 Neb. 328; *Moline v. Carlson*, 92 Neb. 419; *O'Connor v. Waters*, 88 Neb. 224; *Lacey v. Zeigler*, 98 Neb. 380.

In the case last cited, it is said in paragraph 2 of the syllabus: "Where a party orally contracts to devise and bequeath to another certain real estate and money in consideration that the beneficiary shall assume a peculiar and domestic relation to the promissor, and render him services of a character to make it practically impossible to

Rine v. Rine.

estimate their value by any pecuniary standard, and the beneficiary, in reliance upon the oral promise, in good faith assumes the relations and fully performs her part of the agreement, she will be entitled, in the event of a breach of the contract by the promissor, to a specific performance of the same as made."

It is required, however, in such cases as those which we have cited, that the evidence in support of the contract shall be clear and convincing. It is contended by appellants that no such proof has been furnished in support of the contract. A number of witnesses were sworn who testified to conversations had with the deceased Hembeck and his wife. Frank Dolezal, attorney for Mrs. Rine, testified to the substance of the testimony of a Mrs. Gortz, a witness who was deceased at the time of the present trial, but who testified at the trial in 1904. The substance of her testimony is that in a conversation with Mr. Hembeck about an improvement which he was making to part of the property involved herein she, Mrs. Gortz, had said to Hembeck that the improvement ought to be extended; that Hembeck told her he would not do it, that the property was Mrs. Rine's after his death, and if she wanted to complete the improvement she could; that there was an arrangement that it was Mrs. Rine's property after he died. This conversation occurred after the death of Mrs. Hembeck.

John A. Rine, the son of Philip and Laura Rine, testified to the friendly relations existing between the Hembecks and his mother; that his mother was very frequently in their home, attended them continually, "and whenever they were sick she would be down there continually and would not be home at all;" that Mr. Hembeck told him of their affection for his mother as a little girl, and "when in later years she got married they would come to town and how they longed for their girl and tried to get her to move to town to look after and take care of them and be close to them, and how my father at the time did not want to come to town and how he ob-

Rine v. Rine.

jected and how finally they induced him to come. They promised him that Laura would be recompensed; that when they died their property would go to her. * * * I think he said that when they moved to town here they were alone, their girl—they referred to Laura as their girl—was out in the country, and they wanted to have her near them, and they tried to get them to move to town. Father didn't want to, but finally they induced my mother to come to town so they would be taken care of, and they promised that when they died she would have the property when they died." Other conversations of a similar character are related by the witness.

A. N. Yost tells of conversations he had with Mr. and Mrs. Hembeck, the substance of which was that they had induced Mr. and Mrs. Rine to move to town; that Mrs. Rine took good care of them, and that she understood that she was to have the property after their deaths. Philip Rine's testimony is of the same purport. It is further shown that, at the time Mr. and Mrs. Rine left the farm, Mr. Rine was conducting an extensive farming and stock business which was abandoned by reason of the change. It clearly appears that Mrs. Rine was faithful to the Hembecks in all things, and that she gave them the care and attention which they desired.

It is objected, however, that the witnesses Dolezal, John Rine and Philip Rine are incompetent witnesses to the conversations with Mr. Hembeck under section 329 of the Code. Dolezal is an attorney for Philip Rine in the action to determine the ownership of the mortgage, and for Mrs. Rine in her actions to quiet title to the real estate. This does not disqualify him as a witness. He has no "direct legal interest." He testified that he had no such interest in the result of the trial. His testimony touching what Mrs. Gortz had testified to on the former trial was not of a transaction between the witness and a deceased person.

John A. Rine has no "direct and legal interest" in the result of the controversy. As the son of Mr. and Mrs.

Rine v. Rine.

Rine, a recovery by either of them vests no title in him. It is likewise difficult to see how, as administrator, he has an interest which disqualifies him. Relationship to the parties interested, while a proper subject to consider as affecting the credibility of a witness, does not affect his competency. Jones, Evidence (2d ed.) sec. 778: "Relationship to the adverse party, if without interest in the result of the suit, affects the credibility but not the competency of a witness testifying as to transactions or communications with deceased or incompetent persons."

Objection is made to the competency of the testimony of Philip Rine upon the ground that as the husband of Laura Rine he has an interest in the real estate which disqualifies him. Without determining whether this objection is well taken, it is enough to say that he had no such "direct legal interest" in the disposition of the personal property, the mortgage, as to disqualify him, and his testimony was properly received. In any event there is sufficient proof without his testimony to sustain the findings of the trial court, so that its admission, if error, is error without prejudice.

The Hembecks were elderly people at the time Mr. and Mrs. Rine moved to Fremont. Mr. Hembeck is shown by the evidence to have been about 74. His wife was somewhat younger. Laura Rine stood to them much as a child. It was very natural for them to want her near them. No circumstance, except the making of the will, tends to dispute the claim of Mrs. Rine, nor is that circumstance so inconsistent with her claim as at first appears. The testator doubtless expected his wife, who was younger than he, to survive him. The devise to her was consistent with the agreement that Mrs. Rine was to have the property after their deaths. The bequest to his niece and nephews represented no very considerable proportion of his estate. In any event the contract is clearly established and was faithfully performed by Mrs. Rine.

The judgment of the district court is

AFFIRMED.

ROSE, J., not sitting.

GEORGE L. HANLEY, APPELLEE, v. UNION STOCK YARDS
COMPANY, APPELLANT.

FILED JULY 25, 1916. No. 19713.

1. **Master and Servant: WORKMEN'S COMPENSATION ACT: PETITION.** The petition for compensation under the workmen's compensation act should set out "the injury in its extent and character" (Laws 1913, ch. 198, sec. 39), and the judgment should conform thereto determining plainly the extent and character of the injury, whether the disability is total or partial, and whether temporary or permanent; it should state definitely the time for which periodical payments must be made.
2. ———: ———: **MODIFICATION OF ORDER.** If the time so found by the court during which periodical payments are to be made does not exceed six months, the order is final; that is, so far as that court is concerned there is no power to modify or change such order. If the time so fixed by the court during which periodical payments are to be made exceeds six months, then, after that time has elapsed, either party may show to the court that conditions have so changed that the order should be changed also. There is no provision in the statute for any application to the district court of any nature until after the six months have elapsed.
3. ———: ———: ———. If the time limited for periodical compensation exceeds six months, no application to modify the order can be entertained until six months after the order is made.
4. ———: ———: ———. Compensation is for disability and ends when disability ends, but the court must find whether there is disability total or partial—temporary or permanent. And if that court finds that there is disability that will not continue for more than six months and fixes the compensation therefor and renders judgment accordingly, it cannot at a subsequent term change that judgment.
5. ———: ———: **DISABILITY.** If the workman is disqualified to continue his regular employment, the fact that he may procure temporary employment in a different occupation for a few days at equal or greater wages would not be conclusive that his disability had ceased.
6. ———: ———: **APPEAL.** If the time limited is not more than six months, the trial court has no continuing jurisdiction over the case, and upon appeal from such order the bill of exceptions must be settled with reference to the term at which such order is made.

Hanley v. Union Stock Yards Co.

7. ———: ———: ———. In such case if the bill of exceptions is not so settled, and motion is made to quash it for that reason, this court upon appeal cannot consider such bill of exceptions for the purpose of reviewing the original order.
8. ———: ———: MODIFICATION OF ORDER. In this case an application was made at a subsequent term to change or construe the order, and the trial court properly dismissed the application because it was made before the six months from the time of making the order had expired.

APPEAL from the district court for Lancaster county:
WILLARD E. STEWART, JUDGE. *Affirmed.*

Mahoney & Kennedy and Guy C. Kiddoo, for appellant.

R. J. Greene, *contra*.

SEDGWICK, J.

In the district court for Lancaster county compensation was awarded to the plaintiff, under the workmen's compensation law of 1913 (Laws 1913, ch. 198, Rev. St. 1913, sec 3642 *et seq.*), for an injury sustained in the employment of the defendant. Afterwards the defendant made application to the court for an order "relieving it from the payment of any further compensation to the said George L. Hanley * * * and for such other relief as to the court may seem equitable and just." The court denied the application, and the defendant has appealed.

The first order granting compensation was made January 26, 1916, and, omitting the formal parts, was as follows: "That there is due and unpaid from the defendant to the plaintiff as compensation, in accordance with the terms of the workmen's compensation law, the sum of \$92.75; that compensation is ordered to be paid by the defendant to the plaintiff under the terms of the workmen's compensation law at the rate of \$8.75 per week from this day during the period of compensation covered by the statute; and that plaintiff recover from the defendant the costs of the action. It is therefore ordered, adjudged and decreed by the court that the plaintiff have and recover of and from the defendant the sum of \$92.75; that the de-

fendant pay to the plaintiff periodically in accordance with the method of payment of the wages of the plaintiff at the time of his injury compensation in the sum and amount of \$8.75 per week during the period of compensation; and that plaintiff recover of the defendant his costs herein." The defendant contends that the meaning of this order is that the weekly payments are to continue during disability, and that the evidence shows that plaintiff's disability was terminated, and that the court should therefore have discharged the defendant from further liability.

Section 3682, Rev. St. 1913, provides: "All settlements by agreement of the parties and all awards of compensation made by the court, except those amounts payable periodically for six months or more, shall be final and not subject to readjustment." And the following section provides that, at any time after six months from the date of the award, it may be modified upon the application of either party under certain specified conditions.

The plaintiff contends that the above quoted order awarded periodical payments for more than six months, and therefore no application could be heard to modify or change it until the six months have expired. The application was made in April, 1916, not quite three months from the date of the original order. Upon this application the trial court found that "the order heretofore made herein was for a period greater than six months, and that this application is prematurely made," and for that reason denied the application. It will be seen that both parties are depending upon technicalities derived from different constructions of the original order of the trial court. This is unfortunate. The statute is remedial in its nature, its purpose was to do justice to workmen without expense, litigation and unnecessary delays.

The petition should set out "the injury in its extent and character" (Laws 1913, ch. 198, sec. 39), and the judgment should conform thereto determining plainly the extent and character of the injury, whether the disability is total or partial, and whether temporary or permanent; it

Hanley v. Union Stock Yards Co.

should state definitely the time for which periodical payments must be made. If the time so found by the court during which periodical payments are to be made does not exceed six months, the order is final; that is, so far as that court is concerned there is no power to modify or change such order. If the time so fixed by the court during which periodical payments are to be made exceeds six months, then, after that time has elapsed, either party may show to the court that conditions have so changed that the order should be changed also. There is no provision in the statute for any application to the district court of any nature until after the six months have elapsed.

No doubt, compensation is for disability and ends when disability ends, but the court must find whether there is disability total or partial—temporary or permanent. And if that court finds that there is disability that will not continue for more than six months and fixes the compensation therefor and renders judgment accordingly, it cannot at a subsequent term change that judgment.

The judgment that compensation shall continue "under the terms of the workmen's compensation law, at the rate of \$8.75 per week from this day during the period of compensation covered by the statute," is, of course, indefinite and unsatisfactory.

The plaintiff, however, alleged in his petition that he was disabled permanently. The court found "generally in favor of the plaintiff and against the defendant." Neither party asked that the judgment be made more definite. The court in the order dismissing the application has definitely construed the first order to require periodical payments for more than six months. If it was for a shorter time the first order should have so found and should have definitely fixed the limit of periodical payments. The evidence shows that the plaintiff on two occasions obtained employment, for a few days, as a carpenter and received wages therefor larger than he had been accustomed to receive at his regular employment before his injury. But, if he is disqualified to continue his regular employment, the fact that he

Hanley v. Union Stock Yards Co.

may procure temporary employment in a different occupation for a few days at equal or greater wages would not be conclusive that his disability had ceased. There was in the original trial considerable expert evidence tending to prove that plaintiff's disability was temporary, but no bill of exceptions upon this evidence was settled within the time limited for settling the same upon an appeal from that judgment. This appeal is treated and must be considered as an appeal from an order made at a subsequent term denying the application to modify that judgment.

The six months from the entering of the compensation order will expire during the current month, and the trial court will then entertain an application to modify the order. If it appears upon careful investigation that plaintiff's disability has ceased wholly or partially, the trial court will so find and make the proper order accordingly.

There are no periods of compensation specified in the statute for less than six months. If the disability is temporary, and the court does not fix a period of more than six months, it has no power to change it at a subsequent term, and no application for such change is allowed in any event until after six months.

We cannot say that the court erred in refusing this application, and the judgment dismissing the application is

AFFIRMED.

LETTON and ROSE, JJ., not sitting.

CASES DETERMINED
IN THE
SUPREME COURT OF NEBRASKA
SEPTEMBER TERM, 1916.

JOSEPH MAUCHER, APPELLEE, v. CHICAGO, ROCK ISLAND &
PACIFIC RAILWAY COMPANY, APPELLANT.

FILED SEPTEMBER 22, 1916. No. 18721.

Carriers: LIABILITY. The contracts pleaded as a defense examined, their substance set out in the opinion, and *held* not to relieve defendant from liability under the facts shown by the record.

APPEAL from the district court for Douglas county:
ALEXANDER C. TROUP, JUDGE. *Affirmed.*

W. D. McHugh, W. H. Herdman and John M. Kelley,
for appellant.

Mahoney & Kennedy, contra.

MORRISSEY, C. J.

Plaintiff brought this action against defendant to recover damages for personal injuries alleged to have been sustained in a rear-end collision on defendant's line of railroad August 12, 1913. There was a verdict for \$12,500, which on motion for a new trial was reduced to \$10,000, and defendant has appealed.

Defendant was, and is, a railroad company engaged in general railroad business, both intrastate and interstate. At the date of the injury plaintiff was an employee of a circus company known as "Barnum and Bailey Shows," but owned by Ringling Brothers, a copartnership. The day preceding the injury the circus company gave a performance in the city of Lincoln, Nebraska, and on the evening of that day loaded its cars with its circus equip-

ment, baggage, and paraphernalia, and its employees. The cars belonging to the circus company were attached to a locomotive engine and way-car belonging to defendant. The engine crew and train crew were made up of the regular employees of defendant. As thus made up, this circus train started for Atlantic, Iowa, where the circus company was to give an exhibition the following day. The train passed eastward over defendant's tracks and passed South Bend, an open telegraph station. Richfield, about twelve miles farther east, was the next open telegraph station, and the stretch of track between these two stations constituted a "block." Shortly after the circus train left South Bend one of defendant's regular passenger trains arrived at that station, and received a "block" restriction card, which required the engineer to proceed at no greater speed than would permit a complete stop at any time within the range of track which was open to his vision. This "block" has a number of cuts and curves. The engineer failed to obey the restriction order and, as a consequence, ran his engine into the rear end of the circus train as it pulled onto a sidetrack at Richfield. As a result of this collision plaintiff received severe and perhaps permanent injuries.

There is practically no dispute as to the facts, but defendant denies liability, relying upon certain contracts set out at length in the pleadings. One of these is a contract between the circus company and defendant, whereby defendant undertook to transport the property of the circus company, consisting of its cars and other equipment, from point to point along its line of road, including the transportation from Lincoln, Nebraska, to Atlantic, Iowa, on special time schedules and at reduced rates. The employees of the circus company were to be conveyed in the cars of the circus company in the same train with the baggage, paraphernalia, and other equipment. This transportation was to be made by defendant furnishing to and for the use of the circus company the necessary locomotives, the fuel therefor, the engine and train

crews and other necessary employees, and granting the right to use defendant's tracks. Among other stipulations contained were the following:

"It is expressly agreed and understood that this agreement is not made by the first party as a common carrier, but only as a hiring of said locomotives, engines and employees, and the use of its railroad to the second party, for the purpose of enabling the second party to move said train between said points; that all of the said cars, coaches and trains shall be operated under the management, directions, orders and control of the second party or its agents.

"It is expressly understood and agreed that all engineers, firemen, conductors, brakemen, train dispatchers and other operators and employees, furnished by the first party, are, in the operation and movement of said cars, coaches, and trains, exclusively the employees of the second party, but all of said cars, coaches, and trains shall be run according to the rules, regulations and time cards of the first party.

"It is expressly understood and agreed in consideration of the first party hiring the use of its railway and furnishing the motive power and employees to handle the second party's cars, coaches, paraphernalia and employees, as aforesaid, and for less than it would receive if it handled said circus cars, paraphernalia, menagerie and employees, as regular freight and passengers upon its cars, and in consideration of the privilege of stopping over at the points hereinbefore designated, that the first party shall not be responsible or liable to the second party, or to any other person, partnership or corporation for any delay of any cars or trains, however caused, and whether or not arising in any way from any one's fault or negligence, of or for any loss, damage or injury to the property or person of the second party or of any one employed by the second party, or being upon any trains or cars, hauled under this agreement or being upon any premises of the first party or connected in any way with said circus,

caravan or menagerie, or with the business of the second party, or for any loss of or damage or injury to the property or person of any one else, or of any partnership or corporation whatsoever, whether or not any such loss, damage or injury arises in any way from, or is in any degree attributable to, any fault or negligence of the first party or any of its officers, agents or employees, in or about the performance of this agreement, or the performance of the first party's general business or in connection with the railroad or property or any duty whatsoever of the first party.

"The second party further agrees and undertakes, as a further consideration hereof, that in case of delay, loss, damage or injury, to the person or property, either of the second party or any other persons, association of persons or corporation, carried or to be carried upon any of the cars or trains herein specified or employed on or about or in connection with the same on the business of the second party, it, the said second party, will release and does hereby release the first party from all liability or claim therefor for loss, damage or injury to itself or its business or property, will indemnify and forever save harmless the first party from all claim, demand, actions, causes of action, costs, judgments, and expenses, including attorney's fees, resulting from or growing out of such delays, loss, damage, or personal injury, the second party hereby assuming and agreeing to defend at its own cost all such claims, demands and actions, and to satisfy and pay the same, and the second party further undertakes and agrees to inform by personal notice, to each thereof, all of the persons permitted by the second party to be carried on any of said cars, coaches, and trains, under the terms of this agreement, and to advise and notify all such persons, and each thereof, that they are carried by the second party and not by the first party, and that the first party has not assumed, with respect to them or their baggage or other personal property, any of the duties and responsibilities of a carrier of passengers.

"It is a further consideration of this agreement, and the parties hereto agree, that the second party is to have sole charge of every person and of all animals and property on any car, coach or train hauled under said agreement, and the first party does not assume, and shall be under no responsibility for the safety of any of the cars, coaches, persons, animals or property on said cars, coaches, and trains, in charge of the second party, or of advance agents, from any cause whatever, and the second party agrees to, and does hereby, indemnify and save harmless the first party against all loss, damage or injury on account of strangers, tramps, or others riding on said cars, coaches or trains, and being injured or killed, or on account of strangers, tramps or other persons being injured or killed in the operation of said cars, coaches or trains, or in the handling, loading or unloading of cars, and will protect the first party from damages, and cost incident thereto, suffered by any one from wild, tamed or domesticated animals escaping from cars or custody, and protect the first party against all loss, damage and cost for and on account of the spread or transmission of any disease to persons or animals from unloading offal or otherwise, and against any fine or penalty arising therefrom, which may be imposed against the first party by any state, municipality or other competent authority."

This contract was made in the state of Illinois, and is claimed to be valid under the laws of that state.

At the time of the injury plaintiff was an employee of the circus company, and, as such employee, was riding on this circus train without having paid, offered to pay, or intending to pay, any transportation whatever, and his right to be thereon was due to his employment, under a contract which he had with the circus company. The train was being moved and operated over the track of defendant in pursuance of the contract heretofore partially set out.

Before entering the employment of the circus company, to wit, June 9, 1913, plaintiff had entered into a

Maucher v. Chicago, R. I. & P. R. Co.

contract in writing with the circus company, containing the following stipulations: "Now, therefore, for valuable consideration, and in consideration of this employment, and the furnishing by first party to second party of transportation and board of the kind customary and usual in the circus business, and in consideration of special personal benefits and advantages beyond the scope of employment inuring to second party herein, the second party accepts and assumes the increased hazard of railroad travel and circus service in all particulars and circumstances, and hereby exempts and releases first party from all claims for injuries, accidents, sickness and damages of whatsoever nature sustained in said service, whether due to negligence (including gross negligence) of first party, their employees, agents or bosses, or the negligence of any employee or agent of any railroad company transporting first party, when said second party is traveling on or using transportation furnished by any railway company under contract with first party; and second party, recognizing said privity in railroad transportation, hereby renounces his rights as 'passenger' in traveling on any railroad line while in said service, and releases all such railroad companies from claim on his part for any damage or injury whatsoever; and second party agrees to protect, indemnify and hold harmless first party and to pay the first party (and when notified to personally assume payment of) all sums which first party may be subject to pay in consequence of any claim by, or injury, sickness or death to, second party; and second party hereby releases first party from any claim he may in the future have due to or growing out of any injury received in said service either as against first party or any railroad company, hereby binding himself, his heirs, executors and assigns firmly by these presents."

Defendant pleads this contract, together with its contract, heretofore partially set out, with the circus company, and alleges that they are valid and binding upon plaintiff, and a full, adequate and complete defense to

his cause of action, alleges that the transportation furnished was interstate transportation, and that the contract and its construction and effect are to be determined solely by the legislation of the United States, and the public policy thereof respecting interstate carriers and interstate transportation, and defendant pleads, and relies upon, as a defense to this action, the contracts pleaded and the laws and policies of the United States in relation to interstate transportation and the carriers thereof.

Defendant further says that the engine and train crews operating the circus train on which plaintiff was riding were the employees of the circus company and not the employees of the defendants, and points out and relies on the clause of the contract between defendant and the circus company which provides:

"The first party agrees to furnish to and for the use of the second party * * * the engineers, firemen and other employees * * * for the transportation of said circus, menagerie, employees and equipment of the second party by train * * * from * * * Lincoln, Neb., to Atlantic, Ia.

"It is expressly understood and agreed that all engineers, firemen, conductors, brakemen, train dispatchers and other operators and employees, furnished by the first party, are, in the operation and movement of said cars, coaches and trains exclusively the employees of the second party, but all of said cars, coaches, and trains shall be run according to the rules, regulations and time cards of the first party."

Defendant follows this with an allegation of negligence on the part of the engine crew and train crew of the circus train in failing to observe and obey rule 99 for protection against rear-end collisions such as occurred in this case, and alleges that plaintiff's injury is due to such negligence, and alleged that plaintiff by his contract made with the circus company had fully released both the circus company and the defendant from any liability for injuries he sustained.

By reply plaintiff admitted signing the contract pleaded, but alleged that he did not receive a copy or duplicate thereof, and that when he signed the same he was not aware that he was executing a release from liability of any railroad company upon whose lines he might have occasion to travel. He alleges that the contract, in so far as it undertakes to relieve the defendant from liability for the injuries he received, is against public policy and is void.

The assignments of error are subdivided many times; but the real contention of defendant is that under the contracts set out defendant is relieved of liability; that the court ought to have instructed a verdict in its behalf; and that it was error for the court to submit instruction No. 3, which, after reciting the substance of the contracts pleaded, concluded as follows:

"In this behalf you are instructed that, in so far as the first contract herein mentioned provided that the agents, servants and employees furnished by the defendant to the circus company and engaged in the operation and movement of said train and cars in the transportation of said circus company's property and employees, at the time referred to, were to be regarded as exclusively the employees of the circus company, except the said cars and train should be run according to the rules, regulations and time card of said defendant, the same may be considered by you as valid and binding between the parties, in so far as this particular action is concerned, and you may therefore assume as a fact conclusively established that the employees aforesaid were, at all times referred to, the servants and employees of the said circus company exclusively and not those of the defendant, and that therefore their acts while so employed in the management, operation and control of said circus train, would be the acts of the circus company and not those of the defendant herein, and any negligence, if any there was on the part of the said agents or employees of said circus train, will not be attributable to the defendant railway company"—and lastly that the judgment is excessive.

It may be noted that in the contract between plaintiff and the circus company plaintiff renounces his rights as a "passenger," but the contract also recites that plaintiff has knowledge that the circus company has contracted with the railroad companies over whose lines they travel to hold them harmless even for their gross negligence, and that this stipulation applies especially to the plaintiff. It is also recited that such railroad company is acting as a private carrier. When we consider the language of this contract wherein plaintiff purports to recognize the railroad company as a "private carrier," and also to renounce his claim as a "passenger," it would appear that he was releasing only such claims as he would have if the railway company were rendering service as a common carrier and he was being transported as a passenger. The trial court took the view that liability arose independently of the relation of carrier and passenger. Conceding that the train on which plaintiff was riding was operated by the employees of the circus company, and that the train crew was then in the employ of the circus company and not in the employ of the railroad company, yet the evidence clearly shows that passenger train No. 6, which, in violation of the rules of the company, ran into the circus train and caused the injury to plaintiff, was a train operated and controlled by the defendant company. Neither plaintiff nor any of the crew of the train on which he was riding are shown to be guilty of negligence, while the grossest negligence may be attributed to the crew of passenger train No. 6. The trial court took the view that the crew of the circus train might be regarded as the employees of the circus company, and charged the jury that plaintiff could not recover unless his injuries were due to the negligence of the crew operating the other train. By his instructions he denied plaintiff the right to recover under the law of Nebraska fixing the liability of a common carrier to a passenger. Without deciding that the contract may be given this broad and liberal construction, suffice it to say, that in

Maucher v. Chicago, R. I. & P. R. Co.

view of the verdict rendered and the condition of the record neither party has been prejudiced. Independently of plaintiff's rights as a passenger, if any he had, he was lawfully upon defendant's tracks and was injured by its negligence. The trial court gave the contract full force in that it recognized defendant's claim to the private character of the transportation and plaintiff's renunciation of his rights as a passenger, and limited the recovery to an affirmative showing of negligence upon the part of the passenger crew.

Contracts whereby an employee is induced to waive or sign away his rights under the law should always be strictly construed. Under the construction placed upon it by the trial court, plaintiff waived his rights as a passenger and consented that the train on which he rode might be considered as a private conveyance, but "that in so far as said contracts aforesaid, or either of them, undertakes to exonerate and release the defendant herein from its acts of negligence in or about the performance of the defendant's general business in the operation of its roads and trains, and to exempt and relieve defendant from any liability for personal injury to any employee of the circus company, and particularly to the plaintiff herein, resulting from the negligence of the defendant as to the proximate cause thereof, the same is void and of no effect." Instruction No. 4.

The jury were told that, unless the train crew in charge of the passenger train No. 6 were guilty of negligence in running that train into the circus train, plaintiff could not recover. It will be seen that, while the contract was not held void *in toto*, the court did hold, and we think properly so, that the contract did not give the defendant company the right to wantonly maim the plaintiff. He was lawfully on its right of way, if not as a passenger, he was at least a licensee.

It is the contention of the appellant that the circus train constituted an interstate shipment, and therefore these contracts must be governed by the federal law. If

governed by the federal statutes at all, they must fall within what is commonly known as the Carmack Amendment to the Elkins law. 34 U. S. St. at Large, ch. 3591, pp. 593-595. This statute expressly provides that "no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed." By another provision of the act it is provided the shipper may for a valid consideration limit the value of his freight, but he is not permitted to release the railroad entirely from liability for its negligence. The act nowhere provides that a railway company may exempt itself from liability for negligently maiming or killing any person.

"That a common carrier cannot exempt himself from liability for his own negligence or that of his servants is elementary. * * * The rule of the common law did not limit his liability to the loss and damage due to his own negligence, or that of his servants. That rule went beyond this and he was liable for any loss or damage which resulted from human agency, or any cause not the act of God or the public enemy. But the rigor of this liability might be modified through any fair, reasonable and just agreement with the shipper which did not include exemption against the negligence of the carrier or his servants. The inherent right to receive a compensation commensurate with the risk involved the right to protect himself from fraud and imposition by reasonable rules and regulations, and the right to agree upon a rate proportionate to the value of the property transported." *Adams Express Co. v. Croninger*, 226 U. S. 491.

If the contracts fell within the federal statute they are void because they undertake to exempt the carrier from all liability, but this was not a contract for the transportation of a mere piece of inanimate freight. It was a contract for the transportation of a person in whose life and safety the state has an interest, and a contract which would undertake to permit his wanton destruction would be against public policy and void. It does not appear,

Maucher v. Chicago, R. I. & P. R. Co.

however, that the liability of the defendant is to be governed by the federal statute. Congress has legislated on interstate shipments as applied to freight, but the act does not reach the questions herein involved, and in the absence of action by congress the questions must be determined by the law of Nebraska. There is no federal legislation touching the liability of railroads growing out of interstate transportation of persons. Such being the case, the law of Nebraska must be held to govern. *Mondou v. New York, N. H. & H. R. Co.*, 223 U. S. 1; *Southern P. R. Co. v. Schuyler*, 227 U. S. 601; *Savage v. Jones*, 225 U. S. 501; *Missouri, K. & T. R. Co. v. Haber*, 169 U. S. 613.

Having found that the federal act does not apply, and that the law of Nebraska governs, let us see what law of Nebraska applies to the facts in this case.

"Railways heretofore constructed, or that may hereafter be constructed, in this state are hereby declared public highways and shall be free to all persons for the transportation of their persons and property thereon, under such regulations as may be prescribed by law. And the legislature may from time to time pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on the different railroads in this state. The liability of railroad corporations as common carriers shall never be limited." Const., art. XI, sec. 4.

"Every railroad corporation shall give to all persons and associations reasonable and equal terms, facilities and accommodations for the transportation of merchandise, produce, commodities and other property of every kind and description upon any railroad owned, leased or operated within the state, and reasonable and equal terms, service, facilities and accommodations for terminal handling of all property and commodities whatsoever." Rev. St. 1913, sec. 5978.

The Constitution declared railroads to be public highways and vested in the legislature authority to regulate

their operation. Under the provisions of the statute quoted every railroad is bound to give transportation on equal terms, and when it undertook to transport this train it engaged in the undertaking, not as a private carrier, but as a common carrier, and would have been bound to render similar service to any other shipper that might make the demand for such transportation. By sec. 6124, Rev. St. 1913, the legislature gave a definition of the term "common carrier:"

"The term 'common carrier,' as used herein, shall be taken to include all corporations, companies, individuals and association of individuals, their lessees or receivers, appointed by any court whatsoever, that may now or hereafter own, operate, manage or control any railroad, inter-urban or street railway line, operated either by steam or electricity or any other motive power, or part thereof, or any express company, car company, sleeping car company, freight and freight line company, telegraph and telephone companies and any other carrier engaged in the transmission of messages or transportation of passengers or freight for hire."

Perhaps the defendant company might have declined to accept the shipment in the form in which it was offered, but, having accepted it and undertaken its transportation, it automatically became a common carrier under the law of this state, and it cannot by private contract exempt itself from the obligations imposed under the Constitution and statutes. *Atchison & N. R. Co. v. Washburn*, 5 Neb. 117.

A common carrier cannot limit his liability so as to cover his own or his servant's negligence. *Farnham v. Camden & A. R. Co.*, 55 Pa. St. 53.

"A railroad company operating a line of railroad in this state is a common carrier, and cannot, under the provisions of the Constitution, limit its liability as such by special agreement with a shipper." *Missouri P. R. Co. v. Vandeventer*, 26 Neb. 222.

"The liability of railroad corporations as common carriers shall never be limited." Const., art. XI, sec. 4.

"A railroad company, in the carriage of goods, is subject to the liability of a common carrier, and must answer for all losses not occasioned by the act of God or the public enemy, and cannot in this state by special contract limit or relieve itself from this liability." *St. Joseph & G. I. R. Co. v. Palmer*, 38 Neb. 463. See, also, *Chicago, B. & Q. R. Co. v. Curtis*, 51 Neb. 442; *Chicago, R. I. & P. R. Co. v. Collier*, 1 Neb. (Unof.) 278; *Union P. R. Co. v. Metcalf & Wood*, 50 Neb. 452, and *Omaha & R. V. R. Co. v. Crow*, 47 Neb. 84. Under the Constitution and the statutes as construed by an unbroken line of decisions of this court, the defendant must be held to be a common carrier in the transportation of the circus train.

The question as to the validity of the contract between the circus company and plaintiff is not altogether a new one in this state. In *Ault v. Nebraska Telephone Co.*, 82 Neb. 434, it is said that an employer "cannot by a direct contract to that effect escape liability for negligence is well settled; such contracts being against public policy. The state has an interest in the lives and healthy vigor of its citizens, which it will not allow the master to endanger by contracting against liability for his negligently endangering them." This case was followed and approved in *Olson v. Nebraska Telephone Co.*, 83 Neb. 735. Guided by these cases, we are led to the conclusion that if the contract under consideration were made in this state it would be utterly void. This leads us then to inquire what effect is to be given to a contract valid where made, but contrary to the public policy of this state, although intended to be performed herein. In *Chicago, B. & Q. R. Co. v. Gardiner*, 51 Neb. 70, this court had before it an Illinois contract, the same state in which this contract was made, that limited the liability of the railway company, and was valid in the state where made. The court said:

"The power by contract in this state to restrict the liability of a common carrier does not exist. The statement that such a restriction is illegal in this state is, therefore, a mere truism. To ask that the law of this state, on principles of comity, shall give way to the law of Illinois is to ask that the courts of this state shall sanction what by the Constitution has been declared illegal and against the public policy of this commonwealth."

Again our court has said: "Our courts, as an exercise of comity, will not enforce a contract resulting from the transaction of business within this state violating the public policy thereof." *Henni v. Fidelity Building & Loan Ass'n*, 61 Neb. 744.

In *Coleman v. Pennsylvania R. Co.*, 242 Pa. St. 304, the supreme court of Pennsylvania had before it a contract essentially the same as the one before us, and in disposing of the case said: "The general rule that no contract, condition, or limitation will relieve a carrier from liability to a passenger for the consequence of its own negligence, or the negligence of its servants, is not open to question, and we need not delay to cite cases in which such contracts have been held to be void as offending against public policy." See, also, *Davis v. Chesapeake & O. R. Co.*, 122 Ky. 528, 5 L. R. A. n. s. 458, and *Texas & P. R. Co. v. Fenwick*, 34 Tex. Civ. App. 222.

Whether plaintiff were a passenger within the common acceptance of that term or not, one thing is clear, he was in a place where he had a right to be. Defendant was a common carrier and was rendering the service usually rendered by a common carrier in his transportation, and the contracts pleaded will not avail to exempt it from liability for its negligence.

Finally, we are asked to set aside this judgment because the verdict is excessive. Plaintiff suffered internal injuries, his abdomen being so severely crushed as to cause him to lose consciousness. He was removed to a hospital, where he was treated by defendant's

surgeon, who after an examination deemed an immediate operation imperative, and made an abdominal incision, and it was found that no rupture of any vital organ was discovered, but crushing had been so severe that the blood vessels and membranes had been torn and lacerated. The incision was sutured and sewed up, but plaintiff continued to suffer and vomiting continued for a period of weeks. Whether his vomiting and suffering were due entirely to the injury received or whether the operation contributed thereto may not be definitely determined, but he was confined to bed for some time, and during that period was able to take but little nourishment. After being released from the hospital he obtained a clerical position and attempted to do light work, but on account of nausea and vomiting was compelled to abandon his employment. The wound did not heal properly, and, at the time of the trial, he had a weakened and debilitated system. According to the testimony of eminent surgeons it would require a further operation before he would be able to perform manual labor. That his suffering was severe and protracted is not questioned. As to whether he will ultimately recover his former vigor, there is serious question. It is said in the brief of appellee, and unchallenged by appellant, that he has already been subject to two surgical operations; he has been unable to work for any but exceedingly short periods, and is threatened with the necessity for a third surgical operation. After seeing him upon the witness stand and hearing the testimony of the surgeons, the jury fixed his damages at \$12,500. This award was reduced to \$10,000 by the trial court. At the time of his injury he was a strong, robust man, 32 years of age, with a life expectancy of more than 33 years. During the summer season while traveling with the circus he received his board and lodging and salary of \$40 a month. During the balance of the year he claims to have earned \$120 a month, and it is claimed that his earnings averaged about \$100 a month. When we consider the serious character of his injuries, the probability of his being permanently disabled, and the

Croghan v. Chicago, R. I. & P. R. Co.

severe suffering he has undergone, we cannot say that the judgment is excessive, and it will not be disturbed.

AFFIRMED.

SEDGWICK, J., concurring.

The plaintiff concedes, at least for the purpose of this case, that the circus train and its attaches, including the plaintiff, were being transported by the circus company and not by the defendant, and therefore that the plaintiff was not a passenger of defendant, and that the plaintiff has the burden of proof of negligence of defendant as the proximate cause of the injury. There is no dispute between the parties as to the meaning and construction of the contract. The decision of this case depends upon the question whether the plaintiff's contract to relieve the defendant from liability for its own gross negligence is valid and enforceable. Can a common carrier exempt itself from liability for its own negligence? The act of congress does not allow contracts of that kind, and the conclusion of the majority opinion is therefore right, but I do not concur in all that is said in the lengthy and, to my mind, unnecessary quotation and discussion of the contract.

JAMES CROGHAN, APPELLEE, v. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, APPELLANT.

FILED SEPTEMBER 22, 1916. No. 18722.

APPEAL from the district court for Douglas county:
ALEXANDER C. TROUP, JUDGE. *Affirmed.*

W. D. McHugh, W. H. Herdman and John M. Kelley,
for appellant.

Mahoney & Kennedy, contra.

MORRISSEY, C. J.

This is an action growing out of the same wreck discussed in *Maucher v. Chicago, R. I. & P. R. Co.*, ante, p.

Croghan v. Chicago, R. I. & P. R. Co.

236. Plaintiff was an employee of a circus company. He had entered into a contract similar in all respects to the contract made between Maucher and the circus company, and it is agreed by all parties that with the single exception of the amount of recovery the cases are substantially the same, and the ruling in one may stand as the ruling in both.

There was a verdict and judgment for \$15,000, and defendant insists that this is grossly excessive. At the time of the accident plaintiff was 31 years of age, with a life expectancy of more than 33 years. He had been employed by the circus company but a short time, and for that service was getting \$15 a month, with his living furnished. It is claimed, however, that the opportunity to travel and visit many of the places of interest in the United States was a consideration inducing him to take this employment, and that prior to taking this engagement he had been earning, as a carpenter, \$1,200 to \$1,500 a year.

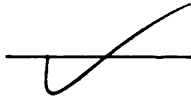
There is little dispute as to the serious character of his injuries. There was an iron rod driven through his knee, his head was cut in several places, his body bruised and lacerated, and his suffering must have been intense. He was confined in the hospital for several weeks, where he was attended by the defendant's surgeon, a man eminent in his profession, who testified as a witness for the plaintiff. There is also the testimony of other eminent surgeons, and from their testimony we gather that plaintiff's knee is seriously crippled. He is suffering from atrophy of the muscles of one shoulder. Dr. Summers, defendant's surgeon at the time of the accident, testified that plaintiff had been under his care from the date of the accident to the date of trial, a period of about six months; that, in addition to the injuries already stated, he was then suffering with a tumor of the left hip. "He has a tumor in the covering of the bone. I would say the upper part of the thigh bone just before it enters into the formation

Johnson v. Petersen.

of the hip joint, that part that we call the tuberosity of the femur or thigh bone. He has a tumor there, the exact nature of which I am not positive about. * * * I think it is a tumor of the periosteum or sarcoma, what is known as sarcoma. We generally speak of sarcoma as malignant because carcinoma or cancer does not attack the bone. I believe it is a malignant tumor secondary to the injury of the upper part of the thigh bone." He further testified that he believed this growth to be malignant or cancerous in its nature, and, while he said that he still had hope of saving the leg, yet he made it clear that it might be necessary to remove the leg at the hip joint. "Q. Taking the situation as it is today, Doctor, although you would still try to bring about a beneficial result by treatment other than a removal of the leg, I would like to have you state whether the prospects of succeeding with such treatment are more or less than the prospects of failure? A. Less. Q. That is, the probability is less on the side of the treatment being successful than against it? A. Yes, sir."

This testimony was corroborated by that of other eminent surgeons, from all of which it quite clearly appears that it would probably be necessary to amputate plaintiff's leg at the hip, and even with this heroic treatment the surgeons expressed grave doubt of his ultimate recovery. In this state of the record, we cannot say that the verdict is excessive, and the judgment is

AFFIRMED.



NEILS JOHNSON ET AL., APPELLANTS, v. LEROY T. PETERSEN
ET AL., APPELLEES.

FILED SEPTEMBER 22, 1916. No. 18896.

1. **Limitation of Actions: TRUSTS.** "The statute of limitations begins to run in favor of a trustee *ex maleficio* of a constructive trust from the time of the discovery of the wrong or fraud, for the prevention of which the trust is imposed; but the statute does not begin to

Johnson v. Petersen.

run in favor of the trustee of a resulting trust until such trustee, by some act or declaration, clearly repudiates his trust." *Hanson v. Hanson*, 78 Neb. 584.

2. **Trusts: EVIDENCE: DECLARATIONS.** In a suit to declare a trust in lands, the declarations of the ancestor through whom the defendants acquired title, without the payment of a monetary consideration, may be received in evidence against the defendants who stand in the place of the ancestor.

APPEAL from the district court for Douglas county: **ABRAHAM L. SUTTON, JUDGE.** *Reversed, and decree entered.*

Weaver & Giller and L. W. Housel, for appellants.

J. O. Detweiler, contra.

MORRISSEY, C. J.

This is an appeal from a decree in equity and involves the title to two lots in the city of Omaha. Plaintiffs are the heirs of one Lena Petersen, who died in 1875. She left surviving her a husband, Soren T. Petersen, who, about two weeks after her death, received, in due course of mail, from Denmark, a draft for \$500 payable to his wife. This draft represented the wife's interest in the estate of a deceased aunt. Mrs. Petersen left no children surviving her, and these plaintiffs are her sole and only heirs. Under the statute then in force the husband took no interest in the wife's personal estate. On receipt of this draft, and without the knowledge of the plaintiffs or anybody having an interest in his wife's estate, Soren T. Petersen forged the name of his deceased wife to the draft, cashed the same, and with the money thus received purchased the lots in controversy. September 25, 1876, he conveyed the lots to Maren Magrethe Thompson, and four days later Petersen and Miss Thompson were married. They lived together as husband and wife until December, 1892, when a decree of divorce was entered. The defendants in this action are the children of this union. When Mrs. Petersen filed her suit for divorce, she alleged that she was

Johnson v. Petersen.

the owner of these lots, but that Petersen had for a long time been in possession and collected the rents and profits therefrom, and that he was also possessed of about \$40,000 worth of property. The record of this divorce case is incorporated in the bill of exceptions, and it appears that the property differences of the parties were amicably arranged. Mrs. Petersen was awarded alimony in the sum of \$5,000, and the decree provided that the title to these lots should be conveyed to the children; Mrs. Petersen to collect the rents during the minority of the children. In compliance with this decree, Petersen and his wife executed a deed of conveyance to the property conveying the title to these defendants.

In 1912 Petersen made what plaintiffs denominate a death-bed confession. He wrote a letter to the plaintiff, Neils Johnson, in which he acknowledged the receipt of the draft payable to the deceased wife; that he signed her name thereto, and that with the proceeds he purchased these lots. He had this letter placed in an envelope and sent to his brother in Denver to be forwarded to the plaintiff after the death of the writer, and his instructions were carried out. The receipt of the draft, its conversion, and the facts and circumstances surrounding the purchase of the property were unknown to the plaintiffs until after the receipt of this letter. The defendants, by answer, plead the statute of limitations; allege that the property was conveyed by Petersen to his second wife in consideration of marriage, and the transfer to the defendants herein by direction of the court. The court entered a decree finding the defendants were the owners of the property in controversy, and confirming title in them.

Appellants make three assignments of error. First, that the court erred in holding that the statute of limitations had run; second, that the court erred in finding that defendants were the owners of the property; third, that the findings and decree of the trial court are not supported by sufficient evidence, and are contrary to the evidence and the law. The court made no specific find-

Johnson v. Petersen.

ings, but the general finding does not indicate that he held that the statute of limitations had run. The plaintiffs moved in due season after receipt of Petersen's letter, which was the first notice they had of the transaction.

"The statute of limitations begins to run in favor of a trustee *ex maleficio* of a constructive trust from the time of the discovery of the wrong or fraud, for the prevention of which the trust is imposed." *Hanson v. Hanson*, 78 Neb. 584.

The two remaining assignments may be considered together. Defendants undertook to show that the letter alleged to have been written by Petersen was a forgery, but the proof is so clear and convincing that it was written by Petersen that no question of its genuineness can be raised. There is also the testimony of Emma Petersen, the third wife, which corroborates the statements made in the letter, and also contradicts the testimony of the second wife, Maren Magrethe Petersen, that the property was deeded to her in consideration of marriage and for \$1 in cash. Emma Petersen testifies that Maren Magrethe Petersen told her that Petersen had given her a conveyance of the property to protect himself from law suits. "She told me that his first wife had inherited some money, and that he had bought the lots with the first wife's money."

The evidence conclusively shows that the property was purchased with the proceeds of this draft, but it is argued that, Petersen having conveyed away the property, his declarations were inadmissible. This is the general rule where a party has taken title to real estate in good faith and for a valuable consideration. It is also said by the appellees that marriage is a valuable consideration, and that Petersen conveyed this property to the second wife as a consideration for her entering into the marriage relation with him, and that the title which she took cannot be impeached or overthrown by his subsequent declarations.

Johnson v. Petersen.

We are not, however, bound to accept her story and believe that the conveyance was made solely for the purpose of inducing her to enter into the marriage relation. The testimony of the third wife, heretofore quoted, shows an entirely different purpose. Then, again, the allegations of her divorce petition show that Petersen continued to collect the rents and profits and treated the property as his own, and this is at variance with her claim of absolute ownership. The court granted her a decree of divorce, awarded her \$5,000 alimony, and decreed that this property be conveyed to the children; she to have its use during their minority. This decree seems to have been entered by mutual consent, and indicates that the property was then regarded as Petersen's, and not as the property of the wife. These defendants parted with no consideration. They hold title, not by virtue of purchase and payment, but because of their relationship to Petersen. He acquired title because he took the money which belonged to these plaintiffs and invested it in this property in fraud of plaintiffs' rights. The testimony is sufficient to show that the defendants hold the property in trust for plaintiffs.

The judgment of the district court is reversed and set aside, and the plaintiffs are adjudged and decreed to be the lawful and rightful owners, and the title is confirmed and quieted in them free and clear of any and all claims of defendants in and to said lots, namely, lots thirteen (13) and twenty (20), in Nelson's addition to the city of Omaha, Douglas county, Nebraska; and plaintiffs shall have and recover their costs.

JUDGMENT ACCORDINGLY.

LETTON and SEDGWICK, JJ., not sitting.

Belk v. Capital Fire Ins. Co.

WILLIAM F. BELK, APPELLANT, v. CAPITAL FIRE INSURANCE COMPANY, APPELLEE.

FILED SEPTEMBER 22, 1916. No. 18945.

Bills and Notes: PAYMENT. When a banker has in his hands a special deposit of money, the property of the maker of a promissory note, sufficient to pay the note, and also holds the note for collection, and upon demanding payment of the maker is directed to take the requisite amount out of the special deposit, and thereupon he says to the maker of the note, "Your note is paid," and thereafter holds it subject to the order of the maker until it is finally delivered to him, payment will be held to have been made at the date of the conversation.

APPEAL from the district court for Lancaster county:
ALBERT J. CORNISH, JUDGE, *Reversed.*

L. C. Burr and R. J. Greene, for appellant.

George E. Hager, contra.

MORRISSEY, C. J.

From a judgment directing a verdict in favor of defendant, plaintiff has appealed. Plaintiff insured his threshing machine, against loss by fire, with the defendant, giving his note in payment of the premium. The policy provided that, if the note was not paid when due, the policy should lapse and liability thereunder cease so long as the note remained unpaid. The note was made payable August 1, 1913, at the office of the company in Lincoln, Nebraska, but on the margin is found a notation directing that it be sent to the State Bank at Grafton for collection. Some time prior to the maturity of the note it was sent to the Grafton State Bank for collection. August 4, 1913, while the note was still in the possession of the Grafton State Bank, the property insured was totally destroyed by fire. Defendant refused payment,

Belk v. Capital Fire Ins. Co.

claiming that the note was past due and unpaid. Plaintiff testified that prior to the maturity of the note the banker at Grafton called plaintiff on the telephone and informed him that he had this note for collection. At that time there was in the hands of the banker money belonging to the plaintiff. This money was not on general deposit, and plaintiff was not carrying a bank account in the bank, but parties for whom plaintiff had done threshing had left the money at the bank for delivery to the plaintiff. When plaintiff was notified by the cashier that he held the note for collection, he directed the cashier to pay the note out of his money which was then in the cashier's hands. The cashier then said, "All right. Your note is paid." Continuing the conversation, the cashier asked plaintiff what he should do with the note. Plaintiff directed him to hold the note at the bank until such time as he would call for it. The cashier testified that he does not remember the conversation, but he does not deny it, and in the state of the record we must assume that it took place as testified by plaintiff.

Assuming then that this is true, we have this situation. The bank is holding money belonging to plaintiff. This money is not deposited and mixed with the funds of the bank, but the bank is acting as bailee. The bank is the agent of the defendant in the collection of this note. Plaintiff authorizes the bank to take an amount sufficient to pay the note out of his money. The banker says: "Your note is paid. Shall I mail it to you or will you call and get it?"—and thereafter holds the note subject to the order and directions of the plaintiff. While the note was thus held, but before the banker had remitted the money to his principal, the property was destroyed. After the fire plaintiff called at the bank, asked for his note, and it was delivered without the payment of any money, or the giving of a check. For the purpose of collecting this note the banker was the agent of the defendant. He had in his hands the money of the plaintiff.

Belk v. Capital Fire Ins. Co.

He was directed to apply this money on the note. This he agreed to do, in fact he did do when he said the note was paid, and thereafter held it subject to the order of the plaintiff. It will not be disputed that, if plaintiff had called at the bank and demanded and received his money and then had passed that money back again to the banker with directions to apply it on his note, that would have constituted payment. Under the circumstances this would be a useless piece of business. The case differs from one where the agent is indebted to the maker of the note and undertakes to pay the note in payment of his own debt. The bank was not indebted to plaintiff, but it was the bailee of his money. It was also the agent of the payee of the note. It acquiesced in his direction to pay the note, told him that it was paid, held the note subject to his order, and finally delivered it upon demand. In this state of the record, it would appear that the note was paid on the date this telephone conversation was had, which, being before the destruction of the property, would entitle plaintiff to recover. What is said here is not intended to conclude the court on another trial as to whether this conversation and agreement actually took place. We are merely assuming this from the record that stands before us. It is a matter to be submitted to a jury, and for this reason the case is

REVERSED AND REMANDED.

SEDGWICK, J., not sitting.

CHARLES E. SANDALL, APPELLEE, v. MORITZ N. OTTO ET AL.;
APPELLANTS.

FILED SEPTEMBER 22, 1916. No. 18976.

1. **Evidence: HYPOTHETICAL QUESTIONS.** In propounding a hypothetical question, a party may assume the existence of facts in accordance with his theory, if there is evidence in the record to sustain it, notwithstanding there may be a conflict of evidence on the point raised.
2. **Appeal: ESTOPPEL.** A party cannot complain of a hypothetical question asked witnesses of the adverse party where the questions asked his own witnesses were of the same nature and assumed substantially the same state of facts.

APPEAL from the district court for York county: EDWARD E. GOOD, JUDGE. *Affirmed.*

Burkett, Wilson & Brown, for appellants.

B. F. Good, contra.

MORRISSEY, C. J.

This is an appeal from a judgment of the district court for York county, wherein plaintiff was awarded a judgment for \$9,565 for services rendered as an attorney. The defendants are the sons of one William Otto, who was the owner of property worth approximately \$600,000, and consisting principally of farm lands. May 17, 1911, William Otto, the father, conveyed all of his property to these defendants to the exclusion of his other three children, namely, Waldo L. Otto, Minnie E. Wiseman, and Emma Faustman. The daughters, Mrs. Wiseman and Mrs. Faustman, upon learning of these conveyances, instituted proceedings in the district court for York county, acting as next friend for their father, praying to have the conveyances set aside because of the alleged mental incapacity of their father, and alleging that these defendants had exercised undue influence over the father

Sandall v. Otto

and that the conveyances of the property, both real and personal, were obtained by fraud and intimidation. There was also a prayer for an accounting of the rents and profits of the property for seven years immediately preceding. The petition set out in detail the age and mental condition of the old gentleman and the relationship of all the parties to the suit.

There is a dispute as to the exact date when the plaintiff in this case was consulted or employed by the defendants herein, who were also the defendants in that action, but the exact date of his employment is not very material. Certain it is that he was employed sometime in the month of October, 1913, and, although he had the assistance of other counsel who were also employed by the defendants, yet he did the major portion of the work of preparing the case for trial and in bringing about the final settlement. The real question which was there presented was the competency of the old gentleman, William Otto, to make the conveyances which were attacked. If he were competent to make the conveyances, it follows that the entire \$600,000 worth of property which he possessed had been transferred to these two sons. If, on the other hand, he was incompetent to make a valid conveyance, and the conveyances were set aside, these defendants would become divested of the title to this large amount of property, but as the heirs of William Otto, provided he remained incompetent to transact business until his decease, they would inherit two-fifths of the property. The brother Waldo L. Otto was not a party to that litigation. That suit was filed October 4, 1913. Plaintiff claims to have been employed by the defendants to conduct the defense thereof on the 7th of October following, while the defendants contend that his employment did not begin until the latter part of that month, and allege that immediately following the filing of the suit they employed an attorney of Omaha, who drew the first answer. That the Omaha attorney did draw the first answer prepared in the case is undisputed, but the case

Sandall v. Otto.

did not go to trial on this answer, but on an answer prepared and filed by this plaintiff. Subsequently another attorney was called in who assisted plaintiff in the trial and management of the case and was paid for his service by the defendants.

Appellants well say that the issues presented in this action are: (a) The time that the plaintiff's retainer took place; (b) the amount and the nature of the services which he performed; (c) the value of such services. The first two are material only in so far as they throw light upon the third. After studying the evidence, we cannot see that it matters very much whether plaintiff was employed on the 7th of October, as he alleges, or sometime thereafter, as contended for by defendants. Certain it is that one of the defendants discussed the case with him about the date he alleges he was employed. He was then transacting other business for the defendants, and when they discussed this suit with him it is fair to presume that they meant to retain him, and that he thereafter understood that he was retained. Surely he would not have felt free to have accepted a retainer from the other side of the controversy, and we think the subsequent conduct of all the parties leads irresistibly to the conclusion that from the date of his first consultation with one of the defendants he considered himself employed, and defendants well knew that he so understood their conversation.

It is alleged that following this employment he devoted the major portion of his time to the preparation and trial of the case until its settlement the following February. This claim was disputed before the jury, but we think it is fairly sustained by the evidence, although we cannot see that a few days more or less spent in interviewing witnesses and preparing for trial can be said to make any material difference. In the preparation of a case for trial a lawyer must be given more or less latitude, and be left free to determine the steps to be taken in order to fully protect his client's interests

Sandall v. Otto.

and prepare the case. The relation of attorney and client contemplates this very thing. When a litigant employs an attorney he cannot determine with any degree of certainty how much time it may be necessary for the attorney to expend in the preparation of his case, but he has a right to expect that the attorney will spend such time as may be necessary to protect his client's interests. A failure to do this may be regarded as a breach of good faith on the part of the attorney, but, like the client, the attorney cannot always tell in advance what work may be necessary to do or how much time it may be necessary to expend, and this must be left to his good judgment. The record shows that plaintiff interviewed a great many witnesses, took a great many depositions, procured a number of affidavits, drew the necessary pleadings, and, in short, did the work which appeared to him as necessary and proper to be done. After the case had been on trial a number of days a settlement was reached, and by the payment of approximately \$79,000 the defendants procured a dismissal of the suit, a settlement of all the claims of their sisters, and had quieted in them whatever interest these sisters might have had in their father's estate.

After a settlement of that litigation plaintiff herein instituted this action to recover for his fees in the sum of \$20,000. The testimony of several witnesses was taken, and they answered a hypothetical question which, in substance, related the nature of the litigation in which the services were rendered, the amount of the property involved, the consideration for the settlement, and assumed that plaintiff had devoted the major portion of his time from his employment in October, 1913, until February 28, 1914, in the service of defendants in that case. The testimony offered on behalf of plaintiff fixed the value of his services at from \$10,000 to \$20,000. This testimony was given by a number of men eminent in their profession. The verdict is fully sustained by the evidence.

Sandall v. Otto.

Appellants say that the chief error complained of is permitting the several witnesses for the plaintiff to answer the hypothetical question propounded to them. The question is subdivided many times, and each subdivision is argued at length in the brief. The question is very long, and we do not deem it expedient to set it out in full. It was propounded to the witnesses at the taking of the depositions prior to the trial of the case, and it undertook to state the facts as plaintiff expected to develop them on the trial. Defendants also took the depositions of a number of witnesses, and the hypothetical question which was propounded to their witnesses was, in substance, the same as that of which complaint is made. The language is so nearly identical as to suggest that each party had reached the same conclusion as to the facts. It may be said, from an examination of all the evidence, that the hypothetical question fairly reflected the case as made by plaintiff, and that this is all that is required. *Ward v. Aetna Life Ins. Co.*, 82 Neb. 499; *Hamblin v. State*, 81 Neb. 148. In propounding a hypothetical question a party may assume the existence of facts in accordance with his theory, if there is evidence in the record to sustain it, notwithstanding there may be a conflict of evidence on the point raised. Under any other rule it is seldom a hypothetical question could be submitted at all. There is generally a dispute as to the facts, and this can be settled only by the jury.

Again, on the cross-examination of defendants' witnesses, counsel for plaintiff, in substance, propounded his hypothetical question again and again and secured answers thereto. On the trial plaintiff declined to read this cross-examination. Defendants then voluntarily read the cross-examination making the testimony their own. In doing this, of course, they not only made the answers their own but the question itself. *Krier v. Milwaukee N. R. Co.*, 139 Wis. 207.

By way of conclusion, appellants say there is no competent evidence to sustain the verdict. This point, we

State v. Chicago, R. I. & P. R. Co.

think, we have already fully covered. It is also said that the court erred in its refusal to submit special findings to the jury, and in its refusal to give certain instructions requested. All disputed questions of fact were submitted to the jury under proper instructions given by the court on its own motion. To quote from defendants' brief, "The court gave a correct general instruction." This being true, it was not error to refuse the instructions requested. No error is found in the record, and the judgment is

AFFIRMED.

STATE OF NEBRASKA, PLAINTIFF, v. CHICAGO, ROCK ISLAND
& PACIFIC RAILWAY COMPANY ET AL., DEFENDANTS.

FILED SEPTEMBER 22, 1916. No. 19539.

1. **Carriers: MAXIMUM RATE STATUTE: INJUNCTION.** When, on an application for a writ of injunction to restrain a railroad company from violating a maximum rate statute, the record shows that from the time the statute became effective, over a long term of years, the defendant has obeyed the provisions of the statute, and on the hearing makes a positive showing of its intention to continue so to do, and there is a total lack of proof of intention or design on the part of the defendant to depart from the policy it has theretofore pursued, the application will be denied.
2. **Courts: JURISDICTION.** When, on application to this court for a writ of injunction, it appears that the federal court for this state has theretofore taken jurisdiction of the subject-matter and that the matters in controversy are then on hearing in that court, the writ will be denied.

Suit for an injunction. *Injunction denied.*

Willis E. Reed, Attorney General, for plaintiff.

Byron Clark, E. P. Holmes, A. A. McLaughlin, Edson Rich, B. P. Waggener, R. A. Brown and J. A. C. Kennedy, contra.

MORRISSEY, C. J.

This is an original action wherein the state, through its attorney general, prayed for a writ of injunction against the defendants forbidding them and each of them from violating section 6074, Rev. St. 1913, known as the "mileage book" statute, and section 6067, Rev. St. 1913, known as the "two-cent rate" statute, and forbidding defendants or any of them from taking any steps to restrain the state or its officers from enforcing the provisions of said statutes.

Before the petition herein was filed the defendants, Chicago, Rock Island & Pacific Railway Company and Missouri Pacific Railway Company had sued out in the federal court for this state injunction orders against the officers of the state, restraining the enforcement of these statutes. The federal court having acquired jurisdiction of the subject-matter, this court refrained from issuing an order as against these two defendants, but issued its restraining order, as prayed, against the other defendants. The defendants Union Pacific Railroad Company and St. Joseph & Grand Island Railway Company took removal orders to the federal court. We thereby lost jurisdiction of them, and they will be considered no further.

It is alleged in the petition that the defendants Chicago & Northwestern Railway Company and Chicago, St. Paul, Minneapolis, & Omaha Railway Company and Chicago, Burlington & Quincy Railroad Company were conspiring and confederating with the other defendants with the intention of violating the provisions of the two statutes mentioned, but on a hearing these defendants submitted the affidavits of their managing agents and officers specifically denying these allegations of the petition, and disclaiming any intention of violating the provisions of these statutes. These statutes were passed in 1907, and became effective in that year, and from that time to this these defendants have observed their provisions. Having obeyed these statutes for so many years, and now positively denying any intention to violate them, without any

State v. Chicago, R. I. & P. R. Co.

showing on the part of the state that they have made any move looking to their violation, we can see no cause for granting an injunction against them, and as to them the application will be denied.

No doubt, the attorney general, learning that the Chicago, Rock Island & Pacific Railway Company and Missouri Pacific Railway Company were taking steps to prevent the enforcement of the statutes, felt in duty bound to bring in all of the railroads in the state and enjoin them against the violation of the statutes, or require them to submit showings to the effect that they intended to obey the statutes. He may be commended for his vigilance, but the roads that have made a proper showing ought not to be held in court, and are entitled to a dismissal.

There has been some suggestion that, because the actions brought by the defendants, Chicago, Rock Island & Pacific Railway Company and the Missouri Pacific Railway Company in the federal court were brought against the attorney general and the railway commission, while this suit is brought in the name of the state, the controversy may proceed in both courts at the same time. This point is not briefed by either party. Before action was taken on this petition the federal court had acquired jurisdiction of the subject-matter, testimony is now being taken in that court, and the attorney general is there protecting the interests of the state. There is no necessity to determine the question of concurrent jurisdiction or to duplicate the work that is being done in the federal court. That court has jurisdiction over the subject-matter of this action, so far as the Chicago, Rock Island & Pacific Railway Company and the Missouri Pacific Railway Company are concerned, and, having first acquired jurisdiction, it will retain it, and the application as to these defendants is denied.

INJUNCTION DENIED.

ROSE, J., not sitting.

Wiig v. Girard Fire & Marine Ins. Co.

MARTIN WIIG, APPELLEE, v. GIRARD FIRE & MARINE INSURANCE COMPANY, APPELLANT.

MARTIN WIIG, APPELLEE, v. AMERICAN INSURANCE COMPANY, APPELLANT.

FILED SEPTEMBER 22, 1916. Nos. 18781, 18782.

Insurance: POLICY: CONSTRUCTION. A policy of insurance contained the provisions: "Lightning Clause. This policy shall cover any direct loss or damage caused by lightning, * * * meaning thereby the commonly accepted term lightning, and in no case to include loss or damage by cyclone, tornado or wind storm." "If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease." The insured frame building had been struck by lightning and had begun to burn when all of the edifice above the floor of the first story was lifted by a tornado and deposited about 200 feet away, where it continued to burn until wholly destroyed. *Held*, that the fallen building clause did not apply, and that the insurer was liable.

APPEAL from the district court for Douglas county:
ALEXANDER C. TROUP, JUDGE. *Affirmed*.

Stout, Rose & Wells, for appellants.

Byron G. Burbank and E. R. Leigh, contra.

LETTON, J.

Action on policy of fire insurance. Plaintiff recovered. Defendant appeals. The policy contains the following provisions; "Lightning Clause. This policy shall cover any direct loss or damage by lightning, * * * meaning thereby the commonly accepted term lightning, and in no case to include loss or damage by cyclone, tornado or wind storm." "If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease."

The answer denies that the building was destroyed or damaged by fire or lightning, and alleges that it "was blown down and totally destroyed by tornado and wind

Wlig v. Girard Fire & Marine Ins. Co.

on the 23d day of March, 1913, so that the said building fell, not as a result of any fire, but solely as a result of said tornado and wind; and there was no loss or damage by fire or lightning to said building prior to the time that the said building was blown down." It is also alleged that the insurance immediately ceased the moment the building fell.

A motion was made at the close of the testimony for a peremptory instruction directing the jury to find for the defendant. This was overruled, and this action is assigned as error. Defendant insists that the evidence shows conclusively that the building did not fall as the result of fire and lightning, but did fall as the result of the tornado; that the defendant's liability under the policy was limited to the damage done by lightning and fire before the building fell; that the plaintiff failed to show the amount of this damage, and that, therefore, there was no evidence upon which a verdict for any amount could be rendered.

A witness was standing at the south window of the kitchen in a restaurant which she and her husband conducted in the village of Ralston. The insured building stood about 100 feet away in a southwesterly direction. While standing there, she saw lightning strike the insured building and saw smoke and flame come from it. She remained at the window scarcely a moment, then went into the dining room, and the next thing of which she was conscious, was that she was sitting in a pile of rubbish, a tornado having struck and wrecked the house. She was severely injured, and was unable to tell how long she had been unconscious. Other testimony showed that all the buildings nearby were torn down and wrecked by a tornado. The superstructure of the insured building was blown away down to the lower floor. It seems that the upper part of the store building was carried by the wind about 200 or 250 feet north and totally consumed by fire. Part of the walls were standing at that place so that one could have gone inside if it had not been on fire. There

was no fire at that time at the original site. No other building in the village was burned.

The jury found specially that the building was struck by lightning and was on fire before its destruction by the tornado; that the fire that consumed the portion on the hill was the same fire, and that the building was wholly destroyed thereby.

It is undisputed that the building was set on fire by lightning and that this fire continued until it was consumed. If the building had remained upon the original site and had there burned down, defendant would have been liable. Does the fact that after the fire began the building was removed a short distance by *vis major* operate to defeat recovery on the policy? If after a fire begins a building is wholly consumed by reason of insufficient fire protection or defective appliances, is the insurer liable? There is nothing in the record to show that the fire could have been extinguished with the existing appliances if the building had remained upon the original site. If, while burning, the position of a building is changed by explosion or some other outside force without the intervention of the insured, will this render the fallen building clause operative? We cannot so hold. Had it not been for the fire which was in the building when struck by the tornado, the partially demolished structure would still have been in existence. Under the fallen building clause, if the building had been blown down, or had fallen before fire was communicated to it, there would be no liability on the part of the insurer, but *contra* if the fire was burning before the building fell. *Transatlantic Ins. Co. v. Bamberger, Bloom & Co.*, 11 Ky. Law Rep. 101. It is held in *Friedman Co. v. Atlas Assurance Co.*, 133 Mich. 212, that the fallen-building provision in a fire policy is a condition subsequent, and that the burden is upon the insurer to prove as a defense that the building fell before the fire started. The opinion quotes at great length from *Western Assurance Co. v. Mohlman*

Wlig v. Girard Fire & Marine Ins. Co.

Co., 28 C. C. A. (U. S.) 157, 40 L. R. A. 561, which holds to the same effect.

In *Insurance Co. v. Crunk*, 91 Tenn. 376, the facts were that before the fire destroyed the building it had been partially wrecked by a tornado. The roof of the two front upper rooms had been blown away, the rafters, ceiling and part of the walls remaining. There was evidence to show that before this some fire had been blown upon the floor by a current of air passing through a room, which was the probable cause of the burning of the building. The court said: "This was evidence sufficient to justify the verdict that the fire commenced before the fall of any part of the building. Of course, if it commenced before the fall, though the entire building fell subsequently, the insurance company would be liable. 2 May, Insurance (3d ed.) sec. 401."

Defendant insists that it is only liable for such damage as occurred before the building was moved by the tornado, and that, since there is no evidence on this point, there can be no recovery. The contention seems to be well answered in the following quotation: "When the fire begins to burn the property insured, the thing insured against has happened, the liability has begun, some loss has become inevitable. It is true that it might happen that a fall occurring during a fire would prevent it from being put out, and thus cause greater loss than would otherwise have been suffered, and the insurer might wish to contract for exemption in such a contingency. But in such a case it would be practically impossible to make an intelligent division, separating the loss occurring before the fall from that occurring afterward. No person owning goods would be willing to make such a contract and assume the burden of such a division, if he understood its effect. If it was the intention to provide for the case of the falling of a building after a fire had attacked the goods and to exempt the insurer from liability for the goods burned after the fall took place, while holding him for that which occurred before, surely more explicit language would have been

used." *Davis v. Connecticut Fire Ins. Co.*, 158 Cal. 766, 772.

We agree that, if it was the intention to place the burden of proof on the insured to show what proportion of the total loss accrued before a building falls and after a fire has begun therein, the policy provision should have been more explicit. The Nebraska flood cases cited are not applicable, since no contract of indemnity was involved, and the burden was on the claimant to prove the extent of his damage, while under a valued policy law a different rule prevails.

Complaint is made with respect to instructions given by the trial court, but, since there is no dispute as to the facts, the instructions could not have been prejudicial. Error is assigned on the refusal to give defendant's instruction No. 8, which, in substance, states that the jury must confine their verdict to actual damages done by lightning and fire to the building on its original site, and that "You cannot give a verdict for the damage done by the tornado." In instruction No. 6 by the court the jury were told, "You must not allow any damages done by the tornado." The remainder of the instruction was properly refused under the facts and the law.

The evidence justifies the verdict, and the judgment of the district court is

AFFIRMED.

HERBERT J. UNDERWOOD, APPELLEE, v. CHICAGO & NORTH-
WESTERN RAILWAY COMPANY, APPELLANT.*

FILED SEPTEMBER 22, 1916. No. 18949.

1. **Appeal: REVIEW.** A cause will be determined upon appeal upon the same theory upon which it was tried in the district court, and, where both parties have tried the case as if a certain, essential element was proved, this court will not reverse the judgment for the lack of evidence of such fact.

*See opinion, p. 507, *post*.

Underwood v. Chicago & N. W. R. Co.

2. **Evidence: INJURIES TO LIVE STOCK: PROOF.** In order to recover damages for an alleged shrinkage in the weight of cattle, alleged to have been caused by delay in their transportation on the part of a common carrier, the fact that there was a shrinkage of weight must be proved by competent evidence, and cannot be established by mere opinion evidence.

APPEAL from the district court for Douglas county:
CHARLES LESLIE, JUDGE. *Affirmed on condition.*

A. A. McLaughlin, Wymer Dressler and Lyle Hubbard,
for appellant.

Sutton, McKenzie, Cox & Harris, contra.

LETTON, J.

Action to recover damages for delay in the shipment of cattle. The plaintiff on the evening of June 23, 1913, loaded six cars of cattle at the station of Dumfries, Iowa, on the line of the Wabash railway, for transportation over that line and the line of the defendant to Chicago. The cars were transported to Council Bluffs on the line of the initial carrier, and there delivered to defendant for transportation to Chicago. Two cars reached Chicago in time for the market on June 25. The cattle in four cars, consisting of 74 head, were unloaded and fed by defendant at Clinton, Iowa, and did not reach Chicago in time for the market on June 25, but were sold the next day. Plaintiff claims damages for extra shrinkage upon these cattle, for a decline in the market price, and for the feed bill at Clinton which he was compelled to pay, amounting in all to \$374.36. The defendant admitted that it received the cattle for shipment, denied any negligence or delay in their carriage, and pleaded a contract that no claim for damages should be allowed unless presented within ten days. The jury returned a verdict for the full amount claimed, and from a judgment thereon defendant appeals.

There is no proof that the claim was not presented within the time limit. Furthermore, defendant received the claim without objection on this score, and offered to pay

Underwood v. Chicago & N. W. R. Co.

a part of the plaintiff's claim. The evidence shows that no delay occurred until after the train reached Boone, Iowa. The manner in which the two cars which reached Chicago in time for the first day's market were entrained or hauled is not clearly shown, but it is fairly inferable that the six cars were in the same train as far as Boone, and that at that station the shipment was divided. The four cars reached Clinton an hour and a half later than the scheduled time of the train, and, since it took nine hours further time to cover the distance to Chicago, the local inspector for the defendant, believing that to send the cattle through without unloading would violate the United States statute (34 U. S. St. at Large, ch. 3594, p. 607), providing that cattle should not be held in cars more than 28 hours without food or water, unless by request of the owner, when the time may be extended to 36 hours, ordered them unloaded and fed. This delay caused their arrival too late for the market on Wednesday.

Defendant now contends that the 28-hour provision of this statute applies, and that a through shipment could not have been made within that time. There was no direct evidence of a request by plaintiff for confinement of the cattle in the cars for 36 hours. The instructions requested by defendant and some of the questions propounded its witnesses show that the case was tried by both parties on the theory that such a request had been made. This court will take the same position on appeal, and hence there is no merit in this contention.

No good reason has been shown by defendant why two cars went through and four cars were delayed. Plaintiff lost by the falling of the market, and was compelled to pay a feed bill of \$24 at Clinton. He also claims a loss of 30 pounds a head for extra shrinkage caused by the delay. The evidence on this point is vague and unsatisfactory. Plaintiff testifies that the cattle were not weighed when shipped, but he thought they would weigh more than 1,400 pounds. It is stipulated that the selling weight was 103,620 pounds, which is an average weight of a little over

Exchange Bank v. Clay Center State Bank.

1,400 pounds. Several stock shippers testified that the extra shrinkage of cattle when held over one day is from 30 to 50 pounds a head, and one testified that on a through shipment 1,400-pound steers will usually fill from 50 to 70 pounds a head. The net weight of the cattle before filling was shown to be 98,880 pounds; deducting this from the conceded selling weight, it appears that the cattle filled a little over 65 pounds a head on an average. The statement is made in a letter offered in evidence by plaintiff that the cattle in the other two cars filled an average of 57 pounds each. The jury evidently allowed a shrinkage of 30 pounds a head on the four cars, since in their verdict they adopted the plaintiff's estimate of loss exactly. The proof does not establish the item of shrinkage, but does support the other claims.

The judgment is therefore reversed, unless plaintiff within 40 days remit \$194.93 of the judgment, being the amount allowed for shrinkage.

AFFIRMED ON CONDITION.

FAWCETT, J., not sitting.

EXCHANGE BANK OF ONG, APPELLANT, v. CLAY CENTER
STATE BANK, APPELLEE.

FILED SEPTEMBER 22, 1916. No. 18596.

1. **Contracts: LEGALITY: ENFORCEMENT.** An agreement between two banks that notes should be transferred by the one to the other for the purpose of making it falsely appear to the bank examiner that the bank so transferring the notes has not violated the law by making excessive loans is illegal and unenforceable.
2. **Evidence: PAROL EVIDENCE.** In such case, if notes are so transferred, and in order to make it falsely appear that the transferee is the owner of the notes they are indorsed, "without recourse," and the transaction entered upon the books of the respective banks as a sale and purchase of the notes, such indorsement and such entries will not be conclusive evidence in favor of either party to

Exchange Bank v. Clay Center State Bank.

such illegal contract that the transaction was a sale of the notes. The original illegal contract may be proved by the written correspondence between the banks, and oral evidence is competent to prove that the notes in question were transferred pursuant to such contract.

APPEAL from the district court for Clay county: LESLIE G. HURD, JUDGE. *Affirmed.*

Rinaker & Kidd, M. L. Corey and Paul E. Boslaugh,
for appellant.

A. C. Epperson and C. H. Epperson, contra.

SEDGWICK, J.

Upon the first trial of this case in the district court for Clay county, the plaintiff recovered a judgment for the full amount of its claim, and the judgment was reversed upon appeal to this court. 91 Neb. 835. Upon another trial the defendant was successful, and the plaintiff has appealed.

The facts in the case are sufficiently stated in the former opinion. From that opinion it appears that the action was brought upon an open account which the plaintiff bank had in the defendant bank. That account included the amount of a certain note and interest. The plaintiff was the payee named in the note, and transferred it to the defendant, and the note when transferred was indorsed, "without recourse." The plaintiff contends that this indorsement constitutes a written contract which cannot be explained or contradicted by parol evidence.

The only controversy was as to this item. From the written evidence in the form of letters, which are set out in the former opinion, it appears that the plaintiff bank had been loaning money to various parties and had more money invested in the notes so taken than it was supposed that the bank examiner would approve, and, in order to deceive the bank examiner, the plaintiff proposed to transfer some of these notes to the defendant bank, and that the transaction should be so executed and so carried upon the books of the respective banks as to

Exchange Bank v. Clay Center State Bank.

make it appear that the defendant bank was the owner of the notes so transferred, whereas it was understood between the banks that these notes in fact should remain the property of the plaintiff bank and should be protected by it. The evidence of this arrangement is in writing, and oral evidence of various witnesses as to what took place when the notes, or some of them, were transferred from the plaintiff bank to the defendant bank shows that the notes were so transferred in pursuance of this understanding. It is contended that the note in question was the individual property of the cashier of the plaintiff bank and that the plaintiff is not responsible for the contract of the cashier in that regard. It is true in the first letter of the cashier he says, "I have a few excess loans, and I may want to send you some of them," but he immediately adds, "Until after we are examined I don't want any excess loans, when examiner is here," and then states at length the terms of the proposed arrangement, all of which would be ridiculous if the notes belonged to the cashier individually, since the bank examiner would have nothing to do with the private property of the cashier. This letter, then, as well as all of the written and oral arrangements show conclusively that the transaction was on behalf of the plaintiff bank, and that the note, which was taken in the name of the bank, was its property. This agreement was in violation of the banking laws, and as against innocent parties would be construed as far as possible against the parties participating in it; but, in an action by one of these banks against the other involving matters included in this unlawful agreement, the plaintiff bank, which was a party to the agreement, ought not to be allowed to recover upon the technical construction of a written indorsement which was contemplated in this unlawful agreement and was in fact a part thereof. If an agreement of this kind contemplates formal writings, such writings, being a part of the unlawful agreement, cannot avail either party.

In re Estate of Brockway.

It is strenuously argued that our former decision should not be regarded as the law of the case because, it is alleged, there are some inaccurate expressions in it, and, also, in the case of *Norman v. Waite*, 30 Neb. 302, which is in that opinion cited as authority. It is not necessary to discuss these alleged inaccuracies in those opinions. In our former opinion it was held that the writings therein recited were competent in evidence, as was the oral evidence which shows that the notes were transferred pursuant to those writings, and we adhere to this conclusion. Under the competent evidence in this case, no other judgment could have been entered than the one complained of, and it is not necessary to discuss the alleged errors of law occurring at the trial.

The judgment of the district court is

AFFIRMED.

IN RE ESTATE OF BROCKWAY.

CHARLES BOON, APPELLANT, v. ESTATE OF BROCKWAY,
APPELLEE.

FILED SEPTEMBER 22, 1916. No. 18921.

1. **Brokers: CONTRACTS: VALIDITY.** An oral contract for the sale of lands between the owner of the lands and a broker or agent cannot be enforced by the broker or agent. Rev. St. 1913, sec. 2628.
2. ———: ———: ———. In an oral contract by a broker to assist in finding and purchasing specified personal property, a provision that certain real estate, at a specified price, shall be used as part payment for the personal property so purchased, will not make the contract one "for the sale of lands," within the meaning of section 2628, Rev. St. 1913.
3. ———: **ACTION ON CONTRACT: HEARING.** In an action upon such oral contract to recover commission alleged to have been agreed upon, if the contract as alleged is denied, and the defendant alleges that the contract with the broker was for the sale of specified real estate, the court should hear the evidence and determine the real nature of the contract.

In re Estate of Brockway.

APPEAL from the district court for Cedar county: GUY T. GRAVES, JUDGE. *Reversed.*

Alfred Pizey, for appellant.

Frank P. Voter, *contra.*

SEDGWICK, J.

A. L. Brockway, a resident of Cedar county, died in November, 1912. About nine months afterwards this plaintiff filed a petition in the county court of that county, alleging that the relatives of the decedent had neglected for more than 30 days to apply for administration, and alleging that the plaintiff was a creditor of the said decedent, and asking that administration of the decedent's estate be had. Upon the hearing in the county court, that court made a finding against the plaintiff as follows: "The court, being fully advised in the premises, by the pleading filed and the proofs offered, finds for the objector, Scott A. Brockway, and his coheirs, upon the issues joined, and against the claimant, Charles Boon, to all of which the petitioner, Charles Boon, duly excepts." From this finding and the order thereon the plaintiff appealed to the district court. In that court a motion was made to dismiss the cause, "Because it appears from the petition herein that the pretended claim of the petitioner against said estate is based upon an oral contract for the sale or exchange of real estate situated in Nebraska; that said contract is void under the laws of Nebraska, and said alleged claim based thereon is invalid and unprovable." The motion was sustained, and the plaintiff has appealed to this court.

In his petition for administration the plaintiff alleged that the estate of the decedent was of the estimated value of \$10,000; that the widow and next of kin have neglected for more than 30 days after the death of the decedent to apply for administration, and stated his claim against the estate as follows: "That on or about the 1st day of October, 1912, the said A. L. Brockway, theretofore hav-

In re Estate of Brockway.

ing been in the hardware business at Crofton, Nebraska, and having lost his stock by fire, entered into an oral contract with your petitioner in the city of Sioux City, in Woodbury county, state of Iowa, whereby said A. L. Brockway promised and agreed that, if your petitioner would procure for him a hardware stock and business, real estate owned by him at Laurel, Nebraska, to be put in as payment or part payment, at a valuation of \$2,000, he would pay your petitioner the sum of \$300 for the service in procuring such stock, business and exchange of properties; that your petitioner performed the service to be rendered by him under said contract, and procured for the said A. L. Brockway a hardware business and stock of hardware at Bancroft, Nebraska, owned by Altschuler, putting said real estate into the deal as part payment at the said value of \$2,000, and the said A. L. Brockway took over said business and stock, paying therefor the sum of \$7,000." He alleged also that the sum of \$85.67 was paid him by the decedent as part payment of the amount due him, and that no more has been paid.

There was an answer filed to the petition, in which the alleged contract was denied, and in which it was alleged that the contract, if any such was made, was for the sale of real estate, and was void under our statute. The statute provides: "Every contract for the sale of lands, between the owner thereof and any broker or agent employed to sell the same, shall be void, unless the contract is in writing and subscribed by the owner of the land and the broker or agent, and such contract shall describe the land to be sold, and set forth the compensation to be allowed by the owner in case of sale by the broker or agent." Rev. St. 1913, sec. 2628.

In *Nelson v. Nelson*, 95 Neb. 523, the contract was in writing, and yet it was said that a contract for an exchange of land and property would not fall within the terms of the statute, as that statute relates only to the sale of lands. This statement, so broadly made, was not necessary in that case, and appears to be dic-

Smith v. Goodman.

tum, and, without approving or disapproving it, it must be considered that the contract in this case is not a contract for the exchange of lands, and the language in the *Nelson* case does not apply.

The petition in this case alleges a contract on the part of the plaintiff to assist the decedent in finding and purchasing a stock of hardware, that the plaintiff did so assist him in accordance with the contract, and that, availing himself of that assistance, the decedent did purchase a stock of goods and paid therefor the price of \$7,000. The allegation that a part of the purchase price was paid by the transfer of title to real estate would not be conclusive that the contract between the parties was for the sale of real estate. The denial of the plaintiff's allegation as to the contract and the allegation of the answer that the contract was for the sale of real estate presented an issue of fact, which as the contract was oral, was a subject of proof. The county court heard the evidence, and upon the pleadings and evidence together determined the issue presented. The district court was clearly wrong in determining the matter upon the record alone and without hearing the evidence.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

LUVINA SMITH ET AL., APPELLANTS, v. THOMAS GOODMAN,
ADMINISTRATOR, APPELLEE.

FILED SEPTEMBER 22, 1916. No. 19545.

1. **Appeal: EFFECT: NEW TRIAL.** Appeal to this court from a judgment in an action does not deprive the district court of jurisdiction to grant a new trial of that action.
2. **New Trial: TIME FOR APPLICATION.** If the court upon appeal affirms the judgment of the lower court, the time allowed for applica-

Smith v. Goodman.

tion for a new trial under the statute begins from the date of the judgment in the district court. If this court upon appeal directs the district court to enter a different judgment than the one appealed from, the time runs from the entering in the district court of the judgment so directed.

3. ———: NEWLY DISCOVERED EVIDENCE: PETITION. The petition for a new trial under section 8207, Rev. St. 1913, must show that the grounds alleged could not, with reasonable diligence, have been discovered during the term in which the verdict was entered or decision made. The alleged newly discovered evidence must relate to the issues joined in the original case, and the petition for a new trial must set out the newly-discovered evidence and show how it is related to the issues presented. The evidence must be material and not merely cumulative. It must be of such a substantial nature as to make it appear that, if such evidence had been received in the original trial, the judgment must probably have been different.
4. ———: ———: RECORDS. Public records will rarely be admitted as newly discovered evidence, and, if records and written documents are relied upon as newly discovered evidence, such writings should be so described, and so much of them set out in the petition for a new trial that the court can determine whether they furnish such material evidence as to require another trial of the cause.
5. ———: ———. The allegation that a witness who testified upon the original trial will now vary his testimony, or even that he will contradict his former testimony upon material facts, furnishes no ground for a new trial.
6. ———: PETITION: DEMURRER. The allegations of the petition for a new trial, the general character of which is indicated in the opinion, are held insufficient to show an abuse of discretion by the trial court in sustaining the demurrer to the petition.

APPEAL from the district court for Johnson county:
JOHN B. RAPER, JUDGE. *Affirmed.*

L. W. Colby and S. P. Davidson, for appellants.

Burkett, Wilson & Brown, Ralph P. Wilson and Jay C. Moore, contra.

SEDGWICK, J.

The district court for Johnson county entered judgment pursuant to the decision of this court in *Goodman v. Smith*, 94 Neb. 227, and thereupon the defendants at the

same term of court filed a motion for a new trial on the ground of newly discovered evidence. The district court overruled the motion, and the defendants appealed to this court. Upon the motion of the plaintiff, the appeal was dismissed, and the defendants began this action in the district court for a new trial under section 8207, Rev. St. 1913. After a demurrer to the petition had been sustained the plaintiffs filed an amended petition, and a general demurrer was also sustained to the amended petition and the action dismissed, and the plaintiffs have appealed.

The original action was in equity, and under the statute this court is required to try such actions *de novo* without reference to the findings of the trial court. For this reason, it is contended that the district court had no jurisdiction to grant a new trial for any reason, as the judgment of that court had been reversed by this court and a new judgment entered pursuant to the findings and judgment of this court. It is said that, this court having directed specifically what judgment should be entered in the district court, this court alone would have jurisdiction to entertain a motion for a new trial. Appeal to this court from a judgment in an action does not deprive the district court of jurisdiction to grant a new trial of that action. *Hellman v. Adler & Sons Clothing Co.*, 60 Neb. 580. This practice has been frequently recognized by this court. We do not think that this objection is well taken. While this court upon appeal tries equity causes *de novo*, it tries them wholly upon the record presented and the evidence taken in the trial court, and determines what judgment should have been entered by the lower court. The judgment directed by this court is predicated upon the evidence already taken, and if that judgment is induced by perjury in the record, or if new evidence is discovered of such a nature as would require the district court to grant a new trial in ordinary cases of judgment in that court, there seems to be no reason why the district court might not entertain jurisdiction in the one case as well as in the other.

It is also contended that, when the new evidence is discovered during or before the term in which the final judgment is entered in the district court, the application for a new trial must be by motion, and that in such a case no action for a new trial under section 8207, Rev. St. 1913, can be entertained by the district court. In the appeal to this court from the order of the district court overruling the motion for a new trial, the motion in this court to dismiss the appeal alleged only the following grounds for such dismissal: "That the decree appealed from was entered pursuant to the mandate of this court giving special direction to the court below as to the decree to be entered." In the order of this court dismissing the appeal, no reason is stated for so doing. It may have been dismissed for other reasons than those stated in the motion. At all events, under the circumstances, without determining whether the decision of that motion and the dismissal of that appeal constituted a bar to this action, we have concluded to examine the petition demurred to and determine whether the facts alleged in the petition would justify the granting of a new trial if regularly and properly presented.

The petition demurred to is very elaborate. It sets out in full the pleadings in the original action, and then alleges at large the grounds relied upon for a new trial by the defendants in the original case, who are the plaintiffs in this case. The petition for a new trial under the statutes must show that the grounds alleged could not, with reasonable diligence, have been discovered during the term in which the verdict was entered or decision made. The alleged newly discovered evidence must relate to the issues joined in the original case, and the petition for a new trial must set out the newly discovered evidence and show how it is related to the issues presented. The evidence must be material, and not merely cumulative; that is, it must be of such a substantial nature as to make it appear that, if such evidence had been received in the

original trial, the judgment must probably have been different.

It will be remembered that after the death of Thomas Phippin, Mrs. Goodman's father, her mother became the wife of one Worthy Luce, who at the time of his death, shortly before the original action was begun, held the legal title to the property in question. After his death his children by his marriage with Mrs. Phippin, Mrs. Goodman's mother, claimed all of the property as the heirs of Worthy Luce, and Mrs. Goodman began the original action to establish an interest in the property as the heir of her father, Thomas Phippin.

A vital question in the original case was whether Thomas Phippin, Mrs. Goodman's father, did, in his lifetime, purchase the 40 acres of land in Wisconsin and pay for the same. The petition alleges that, before the trial of the original case in the district court, these petitioners, as defenders in that case, "employed competent legal counsel and made diligent efforts to secure proper evidence to establish the facts in said action under the issues therein, and as defendants alleged them to be in their said answer and cross-petition." They name a well-known and able counsellor of this court as the attorney so employed, and allege that he made the most thorough and careful investigation of all the evidence, including the known witnesses and the public records from which any evidence could be obtained, and that they made use of the evidence so obtained upon the original trial. They allege that one of the plaintiffs, who was a defendant in the original action, "made a trip to the state of Wisconsin and made diligent inquiries among the former neighbors, friends and acquaintances of said Thomas Phippin and said Worthy Luce, and caused the public records in Waukesha and Milwaukee counties in said state to be examined in search of proofs in support of the allegations in said defendants' answer and cross-petition, and also made diligent inquiries from all those then living who seemed to be liable to have any knowledge upon said sub-

Smith v. Goodman.

ject in search of such proofs; and these petitioners further caused S. P. Davidson, their attorney, at great expense to them, to make two separate trips to Waukesha county, Wisconsin, in search of such proofs, and said S. P. Davidson made said two trips for such purpose, and made diligent search in said state for such proofs and any and all evidence which would have a bearing upon the issues in said action, by consulting former acquaintances and neighbors of said Worthy Luce and of said Thomas Phippin, and by consulting a local attorney in the city of Waukesha, Wisconsin, to aid in such search, and said S. P. Davidson also made further diligent search and inquiries among the neighbors and acquaintances of said Worthy Luce in the state of Nebraska for such proofs and for evidence in support of the allegations set forth in the defendants' answer and cross-petition in said action, and for any and all evidence that would throw any light upon the issues in said case; but, notwithstanding the said efforts on the part of the said Luvina Smith and of these petitioners and their said attorney, they were each and all unable to obtain any other proofs or evidence on their behalf than those presented in the trial of said action in the district court, as shown by the bill of exceptions allowed therein, and were unable to show by competent evidence or discover witnesses who would testify to the facts set forth in defendants' answer and cross-petition," and that, after the trial and final decision in the district court pursuant to the mandate of this court, these petitioners, defendants in that case, employed another lawyer, not alleged to be more competent than the first, "and renewed their efforts and search at great expense to discover proofs and evidence in support of the defense and of the allegations set forth in their answer and cross-petition, and caused L. W. Colby to go to the state of Wisconsin and make inquiries of public officers," and to do various other things quite similar to those things performed by the first attorney.

It seems from the allegations of the petition that the second attorney discovered some matters that had escaped the diligent search of the first. These matters are of more or less importance, and would in some respects, perhaps have added some additional evidence, but it does not appear from the allegations that he discovered and could produce any official record that would necessarily have required a different decision of the original case. It is alleged that the plaintiffs have discovered evidence since the final decision in the district court "that said Thomas Phippin was not the owner nor in the possession of, in lifetime or at his death, of the forty-acre tract of land in Waukesha county, * * * and did not at any time purchase the same from Henry Redford or any other person;" that they "will be able to prove the foregoing facts of ownership and possession by the custodian and the records of Milwaukee county, in the territory of Wisconsin, and by the custodian and records of said territory in the land office at Madison, Wisconsin, and by an ancient document, purporting to be a land officer's receipt, dated in 1847, and discovered by these petitioners among certain old papers and rubbish formerly in the possession of Worthy Luce at his old farm and residence in Johnson county, Nebraska, found since the judgment, decree and findings entered in the district court for Johnson county." Such allegations of new evidence and what they would be able to prove thereby are altogether too indefinite. They should allege what the documents are, setting out so much of them as will show their authenticity and what they would establish if received in evidence, so that the court can judge from the documents themselves whether the evidence they furnish would probably require a different judgment from the one already entered. There are many other allegations of the same general nature, to which the same objections apply. To analyze all of these would too greatly extend this discussion.

Smith v. Goodman.

It is alleged in the petition for a new trial that the plaintiff in the original trial introduced the testimony of one Ira Redford, who testified that Thomas Phippin traded for the land and "obtained the title and possession thereof from his brother, Henry Redford, and held such possession from the date of said trade till the time of said Thomas Phippin's death." It then alleges reasons for supposing that the evidence of Redford was not reliable, and continues, alleging a large amount of other evidence introduced by the plaintiff in that action which was material to the issues there presented, and then alleges "that all of said evidence and testimony and each and every part thereof was at the time of its introduction, as hereinbefore set forth, and is, false and untrue." The allegation that a witness who testified upon the original trial, will now vary his testimony, or even that he will contradict his former testimony upon material facts, furnishes no ground for a new trial. If a new trial should be had because of his change of testimony, and a different judgment entered, he might then again change his testimony and still another trial would be required.

Records showing that the title to the Wisconsin land was never in the name of Thomas Phippin is not new evidence. It appeared upon the former trial that no deed was made until after the death of Phippin, and the deed was then made to his wife, the mother of Mrs. Goodman. That the mother of Mrs. Goodman had possession of the land and exercised acts of ownership over it at and before her marriage with Worthy Luce is not material evidence, and is not inconsistent with the evidence upon the former trial.

Upon the former trial Mrs. Goodman testified that she never knew that her interest in these lands was denied, or that the title was not held in trust for her under mutual understanding by all parties interested, until very shortly before her action was begun in the district court. This evidence was very important to take her action out of the statute of limitations, and was apparently

Smith v. Goodman.

not denied upon the former trial. It is now alleged in the petition for a new trial that on several occasions, once as early as 1874, and other occasions more than ten years before the action was begun, Mrs. Goodman insisted upon her interest in the land, and that the parties holding the legal title denied that she had any interest, and absolutely rejected her claims. If this was true, the statute of limitations would have run against Mrs. Goodman's action long before she commenced the same, which would have required a judgment for the defendants in that action. It is alleged in the petition for a new trial that these facts can be proved now by John Rutter, who resides at Oneida, Kansas, and by Lydia Horn, who resides in Lincoln, and by the testimony of other competent witnesses not named. The petition does not show who John Rutter is, nor why his evidence could not have been procured upon the original trial. It is alleged that Mrs. Horn is the widow of Henry Horn, who was the brother of Ann Luce, Mrs. Goodman's mother. It is alleged that they attempted to get the evidence of Mrs. Horn, and for that purpose wrote her a letter, "requesting her to make a statement of her knowledge of the facts," but received no answer, and that they did not know that those facts were within her knowledge. It seems that a personal interview with Mrs. Horn elicited all the knowledge she had in regard to the matter, and if these plaintiffs knew that she was a sister-in-law of Mrs. Luce, and had reason to suppose that she might be able to give testimony, it seems strange that no personal interview was had before the original trial. Mrs. Goodman died before the original action was finally determined, and we do not think that the trial court erred in refusing to grant a new trial for the purpose of taking the testimony of these two witnesses upon a matter that does not go to the merits of the case under the circumstances in this case. If Mrs. Goodman was still living, and could meet these witnesses in court, and these plaintiffs had shown due diligence to discover the evidence

Smith v. Goodman.

of these two witnesses, the conditions would be quite different.

It appears from the petition that this plaintiff, Luvina Smith, "resided in the state of Indiana during all the time that Worthy Luce lived in Johnson county," and that "George Luce and Mary Luce did not reside with Worthy Luce, and had no means of knowing * * * what the facts were in regard to the ownership" or the sale of the Wisconsin land or the investment of the proceeds thereof, and, as suggested in the former opinion, Mrs. Goodman and her mother and stepfather had no quarrels, and apparently had complete understanding of their business matters, and now, after the death of all the parties directly interested, these heirs of Worthy Luce, relying upon the fact that the parties interested in the property allowed the title to remain in the name of Worthy Luce, and that they would inherit directly from him, while Mrs. Goodman does not, attempt to deprive Mrs. Goodman and her heirs of Mrs. Goodman's interest in the property. The law does not favor new trials because of alleged newly discovered evidence after all the parties interested in the judgment already entered have died; and in all cases those who seek for another trial upon such grounds are required to make strict and satisfactory proof that new evidence has been discovered that could not have been found before the original trial by due diligence, and that such evidence is of such a character that the court can see from the proposed evidence itself and the nature of the case that if it had been introduced upon the former trial a different judgment would probably have been entered. It may be that if another trial is had these plaintiffs would be able to defend against the claims of Mrs. Goodman so as to require a judgment in their favor, but the allegations of this petition are not such as to require this court to hold that the trial court abused its discretion in sustaining the demurrer and dismissing the petition.

The judgment of the district court is

AFFIRMED.

JOSEPH H. MILES, EXECUTOR, ET AL., APPELLANTS, v. RICHARDSON COUNTY, APPELLEE.

FILED SEPTEMBER 22, 1916. No. 18928.

1. **Counties: BRIDGES: LIABILITY.** In constructing and maintaining a bridge for public use, as part of a county road, the county is not limited in its duty by the creation of a structure sufficient for the passage of ordinary vehicles, but it is required to provide for what may be fairly anticipated for the proper accommodation of the public at large in the various occupations which may be pursued in the locality where it is situated, including the driving of cattle to and over the bridge and its approaches. *Seyfer v. Otoe County*, 66 Neb. 566.
2. ———: ———: ———. Where the approach to the bridge was constructed by nailing planks to the piles which supported it and then filling earth in the frame work, and the earth was partly washed away on one side of the approach so that there was a visible hole down through the approach on that side surrounded by a thin crust on the surface, and the plaintiff's steer fell through while being driven along the highway at this point, by the plaintiff, with his other cattle, and was greatly injured thereby, the plaintiff should be allowed to prove his damages in an action brought by him for that purpose against the county; the county having failed to repair the approach after a reasonable lapse of time, and was therefore properly presumed to know the condition of the same and to be derelict in the discharge of its duty to the public.

APPEAL from the district court for Richardson county:
JOHN B. RAPER, JUDGE. *Reversed.*

Edwin Falloon, for appellants.

J. E. Leyda, contra.

HAMER, J.

Appeal from the district court for Richardson county. An action was brought to recover the value of a steer injured by falling through the approach to a bridge. It was so injured that it became necessary to kill the steer. The defendant county had a verdict and judgment, and the plaintiffs have appealed.

Miles v. Richardson County.

The appellants contend that the verdict is not sustained by the evidence. The evidence shows that the bridge in question is constructed over Contrary creek, a stream of water which maintains a constant flow, that the piles on which the bridge rests are within the bed of the stream, and that an approach to the bridge has been constructed by nailing plank to the piling and nearly to the surface of the water, and then by filling in to this framework with dirt. The waters of the stream had washed under a portion of this dirt approach and had carried it away, leaving a hole showing in the approach, and which hole was surrounded by a thin crust. As the cattle of the plaintiff were being driven to market across this bridge, one of them stepped into the hole, or was pushed into it, or was pushed onto the thin crust which surrounded the hole. The hole in the approach had made the condition of the bridge dangerous for a considerable period of time. The witnesses fixed the time at from two weeks to a month.

That the bridge was reasonably safe for travel with a team and wagon did not relieve the county of its duty to make it reasonably safe for the passage of cattle. We are convinced that it was not safe for that purpose. The requirements of a bridge are that it shall be reasonably safe for such use as the public may make of it. *Kovarick v. Saline County*, 86 Neb, 440. In the case cited the bridge was insufficient to support a traction engine and threshing machine. This court quoted, with approval, *Seyfer v. Otoe County*, 66 Neb. 566. In that case it was stated in the syllabus: "In constructing and maintaining a bridge for public use, a municipality is not limited in its duty by the ordinary business use of the structure, but is required to provide for what may be fairly anticipated for the proper accommodation of the public at large in the various occupations which, from time to time, may be pursued in the locality where it is situated." The passage of cattle across a bridge is certainly a use to be anticipated where the bridge forms a part of a country road.

Mundy v. Meyer.

The dangerous condition of the bridge had been apparent for such a length of time as to charge the county with notice of its condition. It was the duty of the county to have the bridge reasonably safe for the passage of cattle. The injury occurred because it was not so. Under the circumstances we think that the verdict and judgment should be set aside.

The judgment of the district court is

REVERSED.

LETTON and SEDGWICK, JJ., not sitting.

JAMES MUNDY ET AL., APPELLEES, v. WILLIAM MEYER,
APPELLANT.

FILED SEPTEMBER 22, 1916. No. 18963.

Appeal: CONFLICTING EVIDENCE. Where the verdict of the jury is based upon conflicting evidence, it will not be disturbed, unless it is clearly wrong.

APPEAL from the district court for Dodge county: WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

Courtright, Sidner & Lee, for appellant.

Albert & Wagner, contra.

HAMER, J.

James Mundy and Anton Bauman, Jr., the appellees, were partners in the real estate business at the time of the transaction recited in the evidence. The appellant, William Meyer, at the time of the transaction recited, was the cashier of the Dodge County Bank, which is located at Hooper. He also had land for sale as an agent. Peter Eberhardt was the owner of 240 acres of land in Dodge county, Nebraska. He was heavily in debt, and his land was incumbered by mortgages. The Dodge

Mundy v. Meyer.

County Bank was one of his creditors. This action was brought by the appellees to recover from Meyer upon an alleged promise made to Bauman to pay a commission if a purchaser should be found who would pay \$34,000 for the land. The appellees, James Mundy and Anton Bauman, Jr., claimed to have found such a purchaser. There was a trial to a jury upon their claim, and a verdict was returned in their favor for the amount of the commission, which was fixed at \$850, without interest. Judgment was rendered on this verdict, and the defendant appealed.

The errors assigned are: First, that the court should have directed a verdict for appellant as requested by the appellant at the conclusion of the testimony; second, that the court erred in excluding evidence offered by the defendant; third, that there is not sufficient evidence to sustain the allegations of the petition; fourth, complaint is made of one instruction.

The first and third contentions may be considered together. It is a sufficient answer to them to say that the evidence was conflicting. The verdict should not have been directed. It cannot be set aside, because, where there is a conflict of the evidence, the question should properly be submitted to the jury. *Smith v. Chicago, St. P., M. & O. R. Co.*, 99 Neb. 719; *Holmwig v. Dakota County*, 90 Neb. 576.

The rulings of the court on the exclusion of the evidence arose during the direct examination of defendant's witnesses. We do not see anything prejudicial in the rulings of the court, nor can the appellant complain.

The instruction complained of is as follows: "If you find that such contract was made, it would be the duty of the plaintiffs to produce a purchaser for the land in question who was able, ready and willing to buy said land and to pay the purchase price therefor, upon the agreed terms; and if the plaintiffs have convinced you by a preponderance of the evidence that they did produce such a purchaser who was able, ready and willing to buy the said land, for the price and upon the terms specified, and who

State, ex rel. Crosby, v. Moorhead.

afterwards did buy the land, and if you are satisfied from a preponderance of the evidence that the contract above referred to was entered into by plaintiffs and the defendant, then your verdict should be for the plaintiffs. But if you are not so satisfied by a preponderance of the evidence, or if the evidence be evenly balanced or preponderates in favor of the defendant, then your verdict should be for the defendant."

We think that this instruction correctly states the rule. The judgment of the district court is

AFFIRMED.

ROSE, J., not sitting.

STATE, EX REL. WILLIS C. CROSBY, APPELLANT, v. HARLEY G. MOORHEAD, ELECTION COMMISSIONER, APPELLEE.

FILED OCTOBER 3, 1916. No. 19731.

1. **Statutes: CONSTITUTIONALITY.** An act complete in itself is not unconstitutional because it incidentally modifies, changes or destroys the effect of existing statutes.
2. ———: **EFFECT: INCORPORATION OF EXISTING LAWS.** The effect of the act providing that "the county attorney shall perform all of the duties enjoined by law upon the county coroner and the county attorney shall be *ex officio* county coroner" is to incorporate in the new law the existing laws defining the duties of the coroner. Laws 1915, ch. 224, sec. 1; Rev. St. 1913, secs. 5662-5684.
3. ———: **CONSTITUTIONALITY: AMENDMENTS.** The act requiring the county attorney to perform the duties of coroner is complete in itself, and does not violate the constitutional provision relating to the amendment of laws. Laws 1915, ch. 224; Const., art. III, sec. 11.
4. **Coroners: POWERS AND DUTIES.** The powers and duties of the coroner are not judicial, within the meaning of the constitutional provision dividing the powers of government into three departments. Const., art. II; Rev. St. 1913, secs. 5662-5684.

State, ex rel. Crosby, v. Moorhead.

5. **Constitutional Law: STATUTE: ADMINISTRATIVE AND JUDICIAL POWERS.** The act requiring the county attorney to perform the duties of coroner is not unconstitutional as clothing an administrative or executive officer with judicial power. Const., art. II; Laws 1915, ch. 224.

APPEAL from the district court for Douglas county:
GEORGE A. DAY, JUDGE. *Affirmed.*

R. M. Switzler, for appellant.

George A. Magney and Ray J. Abbott, contra.

ROSE, J.

This is an application for a peremptory writ of mandamus to compel respondent, as election commissioner of Douglas county, to place upon the official ballot for the election to be held November 7, 1916, the name of relator as a candidate for coroner. The application was resisted on the ground that the legislature of 1915 imposed upon the county attorney the duties of coroner. From a dismissal of the proceeding relator has appealed.

The question presented is the validity of an act entitled:

"An act to provide that the county attorney shall be *ex officio* county coroner, that he may delegate certain duties to the sheriff and county clerk, and to repeal all acts and parts of acts in conflict herewith." Laws 1915, ch. 224.

The legislation contains two sections, which are as follows:

"Section 1. On and after the first Thursday after the first Tuesday in January, 1917, the county attorney shall perform all of the duties enjoined by law upon the county coroner and the county attorney shall be *ex officio* county coroner. The county attorney shall receive no additional fees for performance of duties prescribed by statutes for county coroner, but shall be reimbursed for all actual necessary expenses incurred by him in the performance of such duties. The county attorney may delegate to the

State, ex rel. Crosby, v. Moorhead.

county sheriff that part of the coroner's duties as now prescribed by statute which relate to viewing dead bodies and serving papers, except that in cases where there may be occasion to serve papers upon the sheriff the county attorney may delegate such duty upon the county clerk.

"Section 2. All acts and parts of acts in conflict herewith are hereby repealed."

Relator contends that the legislature violated the constitutional provision: "No law shall be amended unless the new act contain the section or sections so amended and the section or sections so amended shall be repealed." Const., art. III, sec. 11.

It is argued that the act is void as an unconstitutional attempt to amend the statute defining the duties of the county attorney and the law requiring the election of a coroner. The act purports to be a new and independent one covering the entire subject to which it relates. Both the title and the body of the act disclose a legislative intent to impose upon the county attorney the statutory duties formerly exercised by the coroner and to repeal acts in conflict with the new legislation. Though the new act changes the law requiring the election of a coroner and imposes new duties upon the county attorney without attempting in direct terms to amend the statutes relating to those subjects, the enactment is not necessarily void for that reason. It is familiar law that an act complete in itself is not unconstitutional because it incidentally modifies, changes or destroys the effect of existing statutes. *Van Horn v. State*, 46 Neb. 62; *Pacific Express Co. v. Cornell*, 59 Neb. 364. In discussing a similar constitutional provision Judge Cooley said:

"The act before us does not assume in terms, to revise, alter or amend any prior act, or section of an act, but by various transfers of duties it has an amendatory effect by implication, and by its last section it repeals all inconsistent acts. We are unable to see how this conflicts with the provision referred to. If, whenever a new statute is passed, it is necessary that all prior statutes, mod-

State, ex rel. Crosby, v. Moorhead.

ified by it by implication, should be re-enacted and published at length as modified, then a large portion of the whole code of laws of the state would require to be republished at every session, and parts of it several times over, until, from mere immensity of material, it would be impossible to tell what the law was. If, because an act establishing a police government modifies the powers and duties of sheriffs, constables, water and sewer commissioners, marshals, mayors and justices, and imposes new duties upon the executive and the citizen, it has thereby become necessary to re-enact and republish the various laws relating to them all as now modified, we shall find, before the act is completed, that it not only embraces a large portion of the general laws of the state, but also that it has become obnoxious to the other provisions referred to, because embracing a large number of objects, only one of which can be covered by its title." *People v. Mahaney*, 13 Mich. 481, 496.

The reasoning of Judge Cooley was adopted in *De France v. Harmer*, 66 Neb. 14. See, also, *Lake v. State*, 18 Fla. 501. Relator's position that the act amends former statutes in violation of the Constitution is therefore untenable.

It is also argued that the act is not complete in itself. This point seems to be based on the proposition that the duties imposed upon the county attorney are not defined in the new act nor made a part of it by re-enactment. The new act declares: "The county attorney shall perform all of the duties enjoined by law upon the county coroner and the county attorney shall be *ex officio* county coroner." Laws 1915, ch. 224, sec. 1.

The effect of these provisions was to incorporate in the new act the law defining the duties of the coroner. For that purpose it was not necessary to embody in the new act the literal terms of the old. This was properly done by reference. *Nebraska Loan & Building Ass'n v. Perkins*, 61 Neb. 254; *Shull v. Barton*, 58 Neb. 741; *People v. Mahaney*, 13 Mich. 481; *Lake v. State*, 18 Fla. 501.

State, ex rel. Crosby, v. Moorhead.

Another argument is directed to the proposition that the act imposes upon the county attorney, an administrative or executive officer, duties of a judicial nature in violation of the constitutional provision declaring:

"The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted." Const., art. II.

In requiring the county attorney to perform the duties of coroner, did the legislature clothe an executive officer with judicial powers in violation of the Constitution? Relator insists that the coroner's powers in relation to inquests are judicial. If there is reason to suppose the death of a person was caused by unlawful means, the statute authorizes the coroner to make an investigation. To that end he is authorized to issue a warrant for the summoning of a jury; to issue subpoenas for witnesses; to conduct an investigation; to receive the verdict; to issue a warrant for the arrest of the suspect, who shall be taken before a justice of the peace for examination; to return to the district court the inquisition and papers connected therewith. Rev. St. 1913, secs. 5662-5684. The power to investigate, including the summoning and examining of witnesses, is not a peculiar function of the judiciary, but is often properly exercised by both the legislative and executive departments of government. *In re Fenton*, 109 N. Y. Supp. 321. A coroner's inquest conducted according to the terms of the present statute is not a judicial proceeding within the meaning of the Constitution. *Cox v. Royal Tribe*, 42 Or. 365; *Queatham v. Modern Woodmen*, 148 Mo. App. 33. The act of a coroner in issuing a warrant of arrest is not the exercise of a power limited exclusively to the judiciary. *Ex parte Gist*, 26 Ala. 156; *State v. Nast*, 209 Mo. 708. The trend of judicial opinion, based upon reason and authority, is that the duties imposed by the act of 1915

State, ex rel. Crosby, v. Moorhead.

upon the county attorney are not "judicial" within the meaning of that word as used in the constitutional provision relating to the division of powers. Const., art. II. It follows that the writ of mandamus was properly refused.

AFFIRMED.

SEDGWICK, J., concurring.

If the office of coroner still exists, the plaintiff has a right to be a candidate for that office.

The plaintiff contends that the office of coroner still exists in this state, and the defendant contends that there is now no such office, it having been abolished by the act of 1915. The plaintiff contends that the former statute which creates county offices and prescribes the duties thereof cannot be amended by implication; that to abolish the office of coroner is to amend the former statute which establishes that office as a distinct office as other county offices are established.

The defendant answers that the act of 1915 is "complete in itself." If we consider that the purpose to abolish the office of coroner and to impose the duties of that office upon another officer is a complete subject of legislation, the defendant's reasoning is unanswerable. But, if the complete subject of legislation is the creation of county offices and prescribing the duties thereof, the plaintiff's position is sound. If the former statute creating county offices had been amended, and the office of coroner omitted, the duties of that office being devolved upon another officer, the legislation would have been regular within the constitutional provision. The letter of the Constitution seems to require that method of changing the law. I cannot see that the purpose of the constitutional provision has been thwarted in this case. The course pursued could not invite surreptitious legislation, nor confuse the law by the changes introduced by implication. I therefore do not consider that it is my duty to dissent from the conclusion of the majority.

Rickert v. Union P. R. Co.

ANNA RICKERT, ADMINISTRATRIX, APPELLEE, v. UNION
PACIFIC RAILROAD COMPANY ET AL., APPELLANTS.

FILED NOVEMBER 17, 1916. No. 18763.

1. **Railroads: NEGLIGENCE.** The erection and maintenance of convenient structures for the use of the patrons of a railroad at a public station is not negligence under ordinary circumstances. This rule applies to one who is entirely familiar with the situation.
2. ———: ———: **FINDING: SUFFICIENCY OF EVIDENCE.** Testimony of witnesses that they did not hear the bell rung, or the whistle sounded, on an engine approaching a public crossing, will not sustain a finding by the jury that such signals were not given, where such witnesses testified that they were not paying any particular attention to that occurrence, and that such signals might have been given without their knowledge, where other witnesses testified positively that signals were given.
3. ———: **ACCIDENT AT CROSSING: CONTRIBUTORY NEGLIGENCE.** A traveler upon a public highway, who attempts to cross a railroad track in front of an approaching train, if he knew, or ought to have known, of its approach, is guilty of contributory negligence which will prevent a recovery for resulting injuries, if the approaching train was in such close proximity to the crossing that a reasonably prudent person could not fairly expect to cross in safety ahead of it.
4. ———: ———: ———. It is the duty of such traveler on a highway, when approaching a railroad crossing, to look and listen for the approach of trains. He must look, where, by looking, he could see, and listen, where, by listening, he could hear, and if he fails, without reasonable excuse to exercise such precautions, no recovery can be had for his death caused by a collision with a passing train.

APPEAL from the district court for Platte county:
GEORGE H. THOMAS, JUDGE. *Reversed.*

*Edson Rich, A. G. Ellick, B. W. Scandrett and Albert
& Wagner, for appellants.*

Reeder & Lightner, contra.

Rickert v. Union P. R. Co.

BARNES, J.

The plaintiff, as administratrix of the estate of Carl Rickert, her deceased husband, commenced this action in the district court for Platte county against the Union Pacific Railroad Company, Thomas Campbell, Hugh Branson, George McQuade, N. J. Buzza and C. C. Covington to recover damages for the alleged negligent killing of her husband. A trial to a jury resulted in a verdict and judgment for \$10,000 against all of the defendants except C. C. Covington. A motion for a new trial was overruled, the defendants excepted, and have brought the case to this court by appeal.

The appellants' first contention is that the trial court erred in refusing to permit the Union Pacific Railroad Company to remove the case to the federal court. It is fairly inferable from the record that the individual defendants were sued jointly with the railroad company in order to prevent a removal of the cause, but we find that the case may be determined without regard to that assignment of error, and therefore it will not be further considered.

The record discloses that the accident, which resulted in the death of Carl Rickert, occurred on the 29th day of October, 1912, at the village of Benton, in Platte county, where the through trains of the defendant railroad company are not scheduled to stop; that plaintiff's decedent who was driving an automobile on a public road, ran against the engine of the second section of defendant railroad company's train No. 9 at a crossing. The train was a through train carrying mail and express matter over defendant railroad company's line of road. After describing the buildings, the equipment of the railroad company, and the surroundings at the place where the accident occurred, the petition alleged that the buildings, structures and box cars were negligently and carelessly so placed as to completely obstruct the view of defendant railroad company's track to the east from any one traveling on the public road referred to; that, on the day

Rickert v. Union P. R. Co.

when the accident occurred, Carl Rickert, the deceased, was proceeding west along the public highway above described, driving an automobile, and observing due care; that train No. 21 stood on the side track; that unknown to said Rickert, but known to the defendants N. J. Buzza, George McQuade and C. C. Covington, the second section of train No. 9 was approaching said crossing at a high rate of speed; that it was the duty of defendants to let train No. 21 stand at the depot until train No. 9 had passed, but, in reckless disregard of such duty, they carelessly and negligently began to move said train forward, and while Carl Rickert was proceeding westward upon said public highway, as aforesaid, said train No. 21, under the control of the defendants, was carelessly and negligently moved westward parallel with him, making a great deal of noise, and completely obstructing the view to the east and northeast; that the defendant C. C. Covington, acting as a switchman, stood at a switch upon the railroad crossing; that, notwithstanding the dangerous nature of said crossing, it was entirely unguarded, except by the said switchman, and it was his duty to warn persons approaching said crossing of their danger; that, when said Carl Rickert reached the corner of the public road, he turned north and approached said track; that he was running his motor at a moderate rate of speed, not more than 10 or 15 miles an hour; that he was in plain sight of the conductor and engineer, above named, and of said switchman; that as he approached said track the engine of train No. 21 was 70 or 80 feet east of him, and still running at a very low rate of speed, so that said deceased had ample time to cross the tracks ahead of it; that said switchman, conductor and engineer on No. 21, above named, were aware of the danger which threatened the deceased, and, although it was their duty to warn him of such danger, they carelessly and negligently failed and refused to do so; that at the same time, on the north main-line track, the second section of train No. 9, operated by the defendants Thomas Campbell and Hugh Branson, was carelessly

Rickert v. Union P. R. Co.

and negligently and in violation of the law approaching said crossing at a rate of speed of more than 60 miles an hour; that, by reason of the situation above described, said train No. 9 was completely concealed from decedent's view, and such noise as it made was drowned by the noise of the local train; that it was impossible for decedent to see or hear it, and he did not see or hear it until it was almost upon him; that under the circumstances he had a right to believe that the defendants N. J. Buzza and George McQuade and C. C. Covington, or one of them, would warn him if another train was approaching from the east, yet he received no warning; that upon seeing said train from the east he immediately applied his brakes, but before the said car could be stopped said section of No. 9, so approaching him, at an excessive rate of speed, as aforesaid, ran into his said car, completely destroying same and instantly killing the said Carl Rickert. The plaintiff prayed for a judgment of \$30,000.

The answer of the railroad company, after denying each and every allegation in said petition contained, not expressly admitted in said answer to be true, denied that its buildings were so located as to obstruct the view of defendant railroad company's tracks, and admitted that plaintiff's decedent was instantly killed by coming in contact with its train No. 9. The answer then alleged that the death of Carl Rickert and the destruction of his automobile were due solely to his carelessness and negligence, and not to any carelessness or negligence on the part of defendant railroad company. The answers of the other defendants were identical with the answer of the defendant railroad company. The reply of the plaintiff to the several answers of the defendants was a general denial.

We have carefully stated the substance of the pleadings because of the conclusion announced by the opinion.

It is the defendants' contention that the verdict and judgment are not sustained by the evidence. The record

Rickert v. Union P. R. Co.

discloses that defendants' railroad, where it passes through Benton, consists of two main-line tracks a sufficient distance apart to maintain a passing track between them. They are laid on a grade about four feet above the level of the surrounding country. The village is almost wholly south of the tracks, and between the town and the south main-line track is a street or public highway, called "Front street," which runs westerly until it passes the depot, where it turns north across the tracks at a distance of 137 feet from that structure. After crossing the tracks it runs westerly along the right of way. The depot is 60 feet long, and is 24.5 feet south of the south main-line track. At a short distance east is a small toilet room about 9 feet square, and 137 feet east of the toilet room is a coal shed about 60 feet long. A considerable distance east of the coal shed there is an elevator called the "Hord" elevator. Some distance farther east is another elevator. The east-bound trains of the defendant railroad company use the south main-line track, and the west-bound trains are run on the north main-line track. About the time the accident occurred defendant railroad company's train No. 21 had arrived at the depot from the east, had discharged its passengers and baggage, and, according to the rules of the company, had backed down to the east and stood on the passing track in order to allow the second section of train No. 9 to pass on the north main-line track.

Plaintiff's witness, John Rickert, testified, in substance, that the deceased at the time of his death was 29 years old; that his health was good, and he was capable of earning \$1,000 or \$1,500 a year; that deceased's hearing and eyesight were both good; that he lived on a farm in plain sight of defendant railroad company's tracks; and that he had no children.

Henry Hoppe, one of plaintiff's witnesses, testified, in substance, that he was living in Benton in October, 1912, and was within 125 feet of the point where Rickert was killed; that when he first saw Rickert he was stand-

Rickert v. Union P. R. Co.

ing by his automobile; that he had difficulty in getting his car started, and when he got it started he turned around and traveled westward. Witness was a little west of the point where the wagon road turns north across the tracks. He testified that, while traveling west toward the corner where he made the turn, Rickert was going from 12 to 15 miles an hour; that he saw Rickert's car as he proceeded north over the tracks, and that as Rickert was traveling north the engine of train No. 21 was about 75 feet from the place of the accident. Witness said he paid no attention to this train as to whether it was in motion or not. He stated that the wagon road is not less than four feet lower than the railroad tracks, and that as it turns north it starts to raise to the level of the railroad grade from 30 to 35 feet from the track. When witness saw Rickert turn north to cross the tracks, he called to him and warned him. When he called to Rickert his head was turned toward the northeast. The wind was blowing from the northwest, and witness was located close to and west of Rickert. Witness was talking with Henry Heible when he saw Rickert go by. Witness saw train No. 9 when he saw Rickert turn north. When he first saw second No. 9 it was very far east of the elevator and was within his vision for about a mile. When he first saw Rickert, he saw the train, which was east of him possibly a mile or more. A person at the point where the wagon road turns north and from there to the railroad track could not see No. 9 approaching under conditions that day. Witness could not see Rickert's car as it struck the train. The engine of the car was still running after the accident and the machine appeared to be out of gear. Witness testified that he did not hear second No. 9 blow any whistle or give any warning of its approach to the crossing, but on cross-examination he said: "Q. You are not prepared to say that they did not whistle? A. No, sir. Q. You are not prepared to say that No. 9's bell wasn't ringing, either? A. No, sir. * * * Q. Were

Rickert v. Union P. R. Co.

you paying any particular attention as to whether the train was whistling or ringing the bell, or not? A. No, sir; I was not." Witness further testified that trains passed through Benton at all hours of the day as fast as they go any place. Second No. 9 passed through there at about that time every morning. It is a fast train and does not stop at Benton. No. 21 frequently side-tracks at Benton for No. 9 to pass.

Witness Heible's testimony was, in substance, the same as that given by witness Hoppe.

George McQuade, called for plaintiff, testified, in substance, that he was the engineer on train No. 21 on the day of the accident; that the train consisted of three coaches and two baggage cars. The coaches were about 60 feet long. One of the baggage cars was 50 feet long. The engine and tender together were between 70 and 75 feet long.

M. C. Cassin testified, in substance, that he sold the automobile in question to Rickert; that the car, when running at 10 or 12 miles an hour, could be very easily stopped in 10 or 15 feet.

The plaintiff's testimony related solely to the fact that she was the widow of Rickert, and as to the amount of his earnings per year. She stated that deceased sometimes went to Benton once a week, and sometimes not that often; that when she went with him they went over the main road which leads to Benton, which is the road on which the accident occurred; that trains could be seen from their home, passing over the Union Pacific railroad tracks.

John Saalfeld, Sr., testified that he was unloading a corn sheller and gasoline engine from the box car standing west of the Hord coal shed. Before the accident he saw Rickert going west. Prior to that he had seen him standing in front of John Smith's store. When driving up to the box car, witness saw train No. 21, but did not know where Rickert was then. The engine of train No. 21 was coming out from behind the Hord coal shed. When

Rickert v. Union P. R. Co.

he saw Rickert going west across the sidewalk in front of the saloon, No. 9 was pulling in. He did not hear the whistle or the bell. On cross-examination he further testified that he did not say that No. 9 did not whistle, and could not say whether No. 9 was ringing the bell or not. When he saw No. 9 passing, he said to the boys: "I am afraid Mr. Rickert is going to get hit by No. 9." He testified that he got down and ran around the west end of the depot.

John Smith, Sr., testified that he saw Rickert traveling west on the road south of the railroad track; that his place of business is about 500 feet from the place of the accident; that he could see the crossing from his place of business, and saw the car come in contact with the engine of No. 9; that while Rickert was going west he was proceeding at the rate of 15 or 20 miles an hour; that he turned to go north over the crossing, and was running slower. Witness testified that he saw second No. 9 north from where he was standing; saw No. 21 when Rickert was traveling west on the road south of the railroad; did not hear the bell on No. 9; did not know that it was No. 9 until it was close to where Rickert was struck; his attention was drawn up there when he was driving that way, and he paid no attention to No. 9; he knew it was coming by the action of the train crew there, and the way they had been switching; he heard the noise of No. 9 when they got close there; could not swear that the bell was not ringing, nor that the whistle was not sounded

A. L. Branson, the engineer of second No. 9, testified, in substance, that his engine was traveling at the rate of 40 miles an hour as it went through Benton. The schedule time through Benton was 44 miles an hour. The train was not making schedule time through the town on the day of the accident because, when approaching Benton, he thought No. 21 was standing at the depot, and so slowed down, because, under the rules, he was not allowed to pass a passenger train while it was standing

Rickert v. Union P. R. Co.

at the depot; but, when he found that No. 21 was away from the depot, he started on again.

The foregoing is the substance of the testimony introduced by plaintiff on which she sought to recover.

George McQuade, when called as a witness for defendant railroad company, stated that he was an engineer on the Union Pacific railroad for 16 years, and was engaged in railroading for 27 years; was the engineer on engine No. 21 on the day of the accident; was due to arrive at Benton at 11:38, but arrived there four minutes ahead of time; pulled the train onto the passing track and up to the depot. After remaining at the depot long enough to unload and load the baggage and passengers, he then backed down east to where the tool house is on the north side of the track; backed down there because second No. 9 was about to pass them, and under the rule of the company they could not pass them while their train was standing at the depot. This is done because, when the passenger train is standing still, passengers are continually getting on and off, and they aim to have a waiting train moving when another train passes, so that the passengers are quiet on their own train and out of the way of the other train. Witness first noticed the automobile approaching the track when it was about on the grade of the road leading up to the track. Everything happened so quickly that he could not tell the speed of the automobile, but thought it was running about 20 miles an hour; thought the automobile struck the engine right back of the cab. When second No. 9 approached, he could see the steam rising from the engine four times, which indicated to him that it was whistling for the crossing, but did not hear it because he was inside of his engine and the air pump and blower were going. When it passed him he heard it whistle for the crossing, two long and two short blasts of the whistle—the regular crossing whistle.

N. J. Buzza, conductor for the Union Pacific Railroad Company for 23 years, and who was the conductor on

Rickert v. Union P. R. Co.

train No. 21 on the day of the accident, testified, in substance, that after doing the station work at Benton his train backed down to a point where it was about opposite the tool house, remaining there three or four minutes. When second No. 9 got within about 100 yards of his train, they started to move westward; heard second No. 9 whistle for the station one long blast of the whistle; heard it whistle for the crossing just before the accident occurred, two long and two short blasts of the whistle, when it was about a quarter of a mile east; could not tell if the bell was ringing, because after hearing the crossing whistle he went inside of his train and closed the door, but heard second No. 9 whistle again for the crossing just as it passed his train. When No. 9 passed it was making lots of noise by the working of the engine.

John P. Waylander, a fireman for the Union Pacific Railroad Company for seven years, testified that he was fireman on No. 21 at the time of the accident; that, after doing station work at Benton, the train backed up to a point opposite the west elevator; did not hear No. 9 whistle for the station or crossing because he had the blower open on his engine and was putting in coal; also moved westward slowly when second No. 9 passed; did not see the accident.

C. C. Covington, for the defendant, testified that he was brakeman for the Union Pacific Railroad Company for four years; was on No. 21 at the time of the accident; that he went to the crossing for the purpose of opening the switch west of where the accident occurred; heard second No. 9 whistle one long blast of the whistle for the station at Benton; heard second No. 9 whistle for the crossing west of the depot; heard it whistle for the crossing again when he was at the switch; the first time second No. 9 whistled for the crossing it was east of the rear of train No. 21; when they whistled for the crossing the second time, it was between the engine of No. 21 and the depot; when the crossing whistle was blown the second time he was in the act of unlocking the switch; saw Rickert's auto-

mobile as it struck the gangway of the engine of second No. 9. Witness testified that just as Rickert got up to the engine he made an effort to turn the steering gear of the front wheel; the bell was ringing on second No. 9 at the time; first heard the bell ringing when the engine whistled for the crossing; it was ringing as it approached the crossing; the weather was clear at the time of the accident.

A. L. Branson for the defendant testified that he was the engineer on second No. 9 on the day of the accident. He testified that he went by the station depot at Benton at 11:42 a. m.; blew the station whistle for Benton at the whistling post, which is not quite a mile east of the depot; blew the whistle for the crossing west of the depot at the crossing whistling post, which was about 80 rods from the crossing, being two long and two short blasts of the whistle; blew the whistle for the crossing again when he was near the tool house; No. 21 was at the side of him then; blew the whistle for the crossing the second time because he saw the brakeman walking ahead, and wanted to call his attention to the fact that second No. 9 was coming, for fear he might step out; did not see Rickert approaching the crossing in his automobile. Witness further stated that he started to ring the bell, which is operated automatically, down by the whistling post; the bell rang continually until he passed over the crossing; that the bell on his engine weighed 200 pounds and made lots of noise. It was in good condition and could be heard a long way. He further testified that he first knew that there had been a collision when the fireman spoke to him about it; that his train was a fast mail and express train, and passes through Benton about that time every morning; that after the collision he examined the engine tender and saw marks on it which indicated that the automobile struck the front edge of the tank. He stated that it broke off the gangway step leading into the cab and the box cover on the front truck of the tender of the tank and knocked some of the steps off of the first car back of the engine; that the pilot of the engine

Rickert v. Union P. R. Co.

had no marks on it at all. Witness testified that the fireman he had with him on that day died about three weeks before the trial. When he was passing through Benton on that day the fireman was sitting on the box seat on the left hand side of the engine, looking out westward ahead of the train.

The brakeman on second No. 9 on the day of the accident testified that the engine bell on his train was rung and the whistle was sounded for both the station and the crossing at Benton. The conductor of that train testified that the warning signals were given as the train approached the station and the crossing in question. He also described the place where the automobile struck the engine and the speed of his train as it passed through Benton. Others testified that the speed was 41.2 miles an hour. The record also shows the number of trains per day which pass that station. It is conceded that second No. 9 was not scheduled to stop at Benton. Many other witnesses testified that they distinctly heard the warning signals of the train given as it approached the crossing. Among those testifying was Miss Emma Ketchmark, who had no interest in the controversy. She testified that she distinctly heard the warning signals given. In fact, it appears from the record that every one at and about the station and that part of the village knew that the train in question was coming for a considerable time before it reached the crossing.

It appears that the tool house spoken of is 660 feet east of the crossing where the accident occurred.

The foregoing is a fair statement of the evidence introduced by both plaintiff and defendants. As we view the record, it contains no testimony tending to establish negligence on the part of defendant railroad company or its employees. The erection and maintenance of the depot and other structures situated on or near the defendant railroad company's tracks in the village of Benton are much the same as those found at like stations on all railroads, and were evidently constructed for the use and convenience of

Rickert v. Union P. R. Co.

the patrons of the road. They had been maintained in the same condition for many years, and were entirely familiar to the plaintiff's decedent. No witness gave evidence tending to establish negligence on the part of the trainmen of train No. 21. It clearly appears that those in charge of second No. 9 exercised every reasonable effort to give warning of the approach of the train. As to the signals, the evidence of persons who did not hear the crossing whistle or the ringing of the bell of second No. 9, and who testified that they were not paying attention to the sounds, and that they might have been given without their knowledge, was not sufficient to carry the case to the jury on that allegation of negligence, for the reason that it was not sufficient to contradict the positive testimony of the many witnesses who heard the whistle sounded and the bell rung. *Hajsek v. Chicago, B. & Q. R. Co.*, 5 Neb. (Unof.) 67; *Chicago, R. I. & P. R. Co. v. Sporer*, 69 Neb. 8; *Brown v. Chicago, B. & Q. R. Co.*, 88 Neb. 604; *Zancanella v. Omaha & C. B. Street R. Co.*, 93 Neb. 774; *Hoffard v. Illinois C. R. Co.*, 138 Ia. 543; *Ives v. Wisconsin C. R. Co.*, 128 Wis. 357; *Rich v. Chicago, M. & St. P. R. Co.*, 149 Fed. 79.

It is contended by appellants that Rickert's death was caused by his own contributory negligence. As we read the record, one of two things occurred, either of which defeats plaintiff's action. If Rickert saw second No. 9 approaching from the east when he started his automobile in front of the bank, and sought to beat it to the crossing, then plaintiff is not entitled to recovery. If Rickert failed to look and listen for the approaching train, which he might have seen and heard, and refused to heed or understand the warnings given him by others, he carelessly and negligently drove his automobile to his death. In that event, the plaintiff must also fail in her action.

It seems clear to us that, if Rickert had looked to the east when he started his automobile, he must have seen second No. 9 approaching from that direction, and, if he had been paying any attention to his own safety, he must have heard the approach of the train in time to have pre-

vented the accident which cost him his life. It appears that, as he turned north to cross the railroad tracks, he was looking to the east from where second No. 9 was approaching, and at that instant he was warned of its approach by those standing at the turn of the road. Again, if he had been looking out for his own safety, he had ample opportunity to see the approaching train from several points along his route from the bank to the crossing. If it be conceded that there was some actionable negligence on the part of the defendant railroad company, or its servants, still the plaintiff could not recover.

A traveler on the highway who, being aware of an approaching train at a railroad crossing, attempts to beat the train over the crossing must suffer the consequences of his own experiment. *Koester v. Chicago & N. W. R. Co.*, 106 Wis. 460; *Thomas v. Central of G. R. Co.*, 121 Ga. 38; *Chicago & E. I. R. Co. v. Chancellor*, 165 Ill. 438; *Storrs v. Grand Trunk W. R. Co.*, 142 Mich. 375; *Lake Erie & W. R. Co. v. Pence*, 24 Ind. App. 12.

It is the duty of a traveler at a railroad crossing to assume a present danger which includes the immediate approach of a train within a dangerous distance. The duty of due care is not discharged unless the traveler looks and listens at a place where looking and listening will be effective, unless a reasonable excuse exists for failing so to do. *Chicago, B. & Q. R. Co. v. Yost*, 61 Neb. 530; *Harrington v. Rutland R. Co.*, 89 Vt. 112.

In *Chase v. New York C. & H. R. R. Co.*, 208 Mass. 137, the court say that it is far more incumbent on the driver of an automobile to exercise control over his conveyance than it is upon the driver of a horse-drawn vehicle. The same rule was applied in *Gage v. Atchison, T. & S. F. R. Co.*, 91 Kan. 253, *Glick v. Cumberland & W. E. R. Co.*, 124 Md. 308, and *Fort Wayne & N. I. T. Co. v. Schoeff*, 56 Ind. App. 540.

In the case at bar, as in *Chicago, B. & Q. R. Co. v. Munger*, 168 Fed. 690, the physical facts conclusively show that either Rickert did not look and listen for the approaching

Plamondon v. Lindsey.

train or that, if he did so, he undertook to cross in front of an eminently threatening danger which he must have both heard and seen. In the one case he was guilty of inexcusable negligence, and in the other of inexcusable recklessness. In either event, according to the well-settled authorities, he was guilty of such contributory negligence as precludes recovery in this action.

The judgment of the district court is therefore reversed and the cause is remanded for further proceedings.

REVERSED.

PETER M. PLAMONDON ET AL., APPELLEES, v. LLEWELLYN L. LINDSEY, APPELLANT.

FILED NOVEMBER 17, 1916. No. 18961.

Injunction: BREACH OF CONTRACT. "A valid agreement in restraint of trade must be established by clear and satisfactory proof to warrant a court in restraining its breach by injunction." *Roberts v. Lemont*, 73 Neb. 365.

APPEAL from the district court for Lancaster county:
P. JAMES COSGRAVE, JUDGE. *Reversed and dismissed.*

F. M. Tyrrell and J. H. Walker, for appellant.

E. P. Holmes, contra.

BARNES, J.

This is an application for an order to enjoin defendant from violating an oral agreement with plaintiffs not to operate a public bath-house. Defendant denied making such an agreement. From an order granting a permanent injunction, defendant has appealed.

For a number of years prior to 1912 plaintiffs operated a public bath-house in the basement of the Savoy Hotel in Lincoln. Defendant was the owner of the hotel

Plamondon v. Lindsey.

and leased to plaintiffs a part of the basement. Disputes arose, and plaintiffs commenced two suits against defendant for damages, and defendant brought an action in forcible entry and detainer and obtained a judgment. March 22, 1912, after considerable negotiation, a stipulation was drawn up and signed by the attorneys for the parties, in which it was agreed that execution should not issue upon defendant's judgment until July 1, 1912; that plaintiffs should vacate the premises by June 1 of that year; plaintiffs agreed to dismiss their actions brought against defendant; and that all rents due from plaintiffs to April 1, 1912, should be canceled. This agreement was performed by plaintiffs and defendant. Plaintiffs moved their bath-house to another building a short distance away. Subsequently defendant commenced to operate a public bath-house in the rooms vacated by plaintiffs, and this action was instituted.

Plaintiffs contend that the stipulation was signed and the premises vacated upon defendant's oral promise that he would not permit a bath-house to be operated in the basement to be vacated by plaintiffs. Defendant contends that the evidence does not sustain the finding that such an agreement was made, and that parol evidence to prove such agreement was inadmissible, since it tended to vary, modify and contradict the term of the written stipulation.

In support of their contention plaintiffs introduced evidence to show that, during the negotiations for the settlement of the law suits, defendant complained that the heating apparatus used in the bath-house caused annoyance to his hotel guests, and that he stated he did not want a bath-house in the basement. Plaintiffs' attorney then told him that, if it was understood that he would not permit a bath-house in the basement, matters could be adjusted. The stipulation above referred to was later drawn up. While it was signed by the attorneys, plaintiffs' attorney stated that this part of the agreement was not included in the stipulation, because he did not think this was necessary. Defendant denied that he ever promised or inti-

State, ex rel. Wookey, v. Elifritz.

mated that he would not permit a bath-house in the basement. There was also testimony upon this point by one of the plaintiffs, but his testimony was not clear, and was in answer to leading questions in the form of conclusions of law.

This is an appeal in equity. The rule is: "A valid agreement in restraint of trade must be established by clear and satisfactory proof to warrant a court in restraining its breach by injunction." *Roberts v. Lemont*, 73 Neb. 365. *Hall's Appeal*, 60 Pa. St. 458; *Klaff v. Pratt*, 117 Va. 739.

The finding upon appeal is that plaintiffs have not shown by clear and satisfactory proof that they are entitled to the relief sought in this action. The judgment is therefore

REVERSED AND DISMISSED.

MORRISSEY, C. J., and LETTON, J., not sitting.

STATE, EX REL. MAY WOOKEY, APPELLEE, v. OWNIE L. ELIFRITZ, APPELLANT.

FILED NOVEMBER 17, 1916. No. 18984.

1. **DIVORCE: CUSTODY OF CHILDREN: DECREE: EFFECT.** Where, upon granting a divorce, the court in its judgment assigns the custody of the children to one of the parties, such disposition will control until the judgment making it is modified by the court upon proper application, and cannot be disregarded in a subsequent proceeding by habeas corpus to obtain possession of the children.
2. **Habeas Corpus: CUSTODY OF CHILDREN.** In a proceeding in habeas corpus to obtain the custody of minor children, if it appears that when the application for the writ was made the children were not detained by the respondent, but were in the custody and control of the juvenile court, no judgment should be rendered against him.

APPEAL from the district court for Lancaster county:
WILLARD E. STEWART, JUDGE. *Reversed and dismissed.*

State, ex rel. Wookey, v. Elifritz.

Frederick Shepherd, for appellant.

Adams & Jeary, contra.

BARNES, J.

This is an appeal from a judgment of the district court for Lancaster county in a habeas corpus proceeding brought, on the relation of one May Wookey, to obtain the custody of Valda and Oreta Elifritz, minor daughters of the relator and respondent, Gwnie L. (sometimes called Joy) Elifritz.

The record discloses that the relator and respondent were divorced by a decree of the district court for Nuckolls county rendered on February 8, 1913, in which the relator herein was plaintiff and the respondent herein was the defendant. The decree gave the custody of the children to the father, and the district court retained control of them for further orders, in compliance with section 1578, Rev. St. 1913.

It appears that, after the expiration of six months from the date of the decree, respondent was married to a Miss Fairbanks, with whom he is living as a present wife; and the relator, about the same time, was married to one Wookey, with whom she was residing at the home of his father near Fairbury at the time when this cause was tried.

It also appears from the record that the foregoing decree of divorce remains in full force and effect, is unreversed and unmodified, and no appeal was taken therefrom. It is thus shown by this collateral proceeding that the trial court in effect partly set aside and held for naught the decree of the district court for Nuckolls county, and changed the custody of the children named in that decree from the father, who was without fault, to the custody of the relator, who was found by that decree to be unfit to have the care and custody of them.

It is contended by the respondent that this was reversible error; that the district court of one county should

State, ex rel. Wookey, v. Elifritz.

give full faith and credit to the decrees of the district courts of other counties until they are set aside in proper proceedings, and that such proceedings is not habeas corpus.

In *Hoffman v. Hoffman*, 15 Ohio St. 427, it was said: "Where a court of common pleas, on rendering a decree of divorce, further decree the 'custody, care, and control' of the minor children of the marriage to one of the parties, a probate court, while such decree remains in force, cannot, as between the parties to the decree, legally interfere with the custody so decreed, either by habeas corpus or letters of guardianship."

"Where, upon granting a divorce, the court, in its judgment, assigns the custody of the children to one of the parties, such disposition of the children will control, until the judgment making it is modified by the court, upon proper application, and cannot be disregarded in a subsequent proceeding by habeas corpus, to obtain possession of the children." *Williams v. Williams*, 13 Ind. 523. *Sullivan v. Learned*, 49 Ind. 252.

In *Jennings v. Jennings*, 56 Ia. 288, it is said: "Where the decree in an action for divorce awards the custody of a child to one parent, it cannot be transferred to the other in a collateral action, but only by a change in the decree, obtained by direct proceedings for that purpose."

In *McNees v. McNees*, 30 S. W. 207 (97 Ky. 152), it was held: "An action by a divorced wife against her former husband, to recover for the care of a child given into her custody by the order granting the divorce, should be brought in the court in which such order was made."

In *Karren v. Karren*, 25 Utah, 87, it was held: "Subsequent changes may be made in a decree for divorce in respect to the disposal of the children or the distribution of the property. Held, that such changes can only be granted in the action in which the divorce decree was granted."

In *Leming v. Sale*, 128 Ind. 317, it was held: "The decree in a divorce suit awarding the custody of a child to

State, ex rel. Wookey, v. Ellifritz.

one of the parties, fixes the status of the child as between the parties until modified or set aside for cause shown by some subsequent, or supplemental, proceeding in the same cause."

Other authorities to the same effect are *Culwell v. Franks*, 3 Ind. T. 548; *Jordan v. Jordan*, 4 Tex. Civ. App. 559; 14 Cyc. 810; *Lee v. People*, 53 Colo. 507; *Norval v. Zinsmaster*, 57 Neb. 158; *Eckhard v. Eckhard*, 29 Neb. 457.

While there may be some isolated cases holding to the contrary, we are of the opinion that the views expressed in the foregoing cases from which excerpts have been given are correct.

It is contended on the part of the relator that there has been such a change in conditions since the rendition of the decree of divorce that the trial court was justified in rendering the judgment appealed from. If such is the case, that fact should have been alleged and shown in an application to the court which rendered the decree.

It is further urged that it was inconvenient for the relator to go to Nuckolls county to present her application; but it may be said that it was just as inconvenient for her to come to Lancaster county from her home in Jefferson county to make the application in this case as it would have been for her to go to Nuckolls county to obtain a modification of the decree.

The respondent further contends that at the time when the relator filed her petition for the writ of habeas corpus, and when the case was tried, he had neither the possession of his children nor their custody, and therefore the writ should not have been awarded. The facts, as shown by the record, are that the relator had the custody of the children before the writ was issued; that the respondent had demanded that she return them to him, which she had refused to do; that she had placed them in the detention home at Lincoln, Nebraska, under the order of the district court, where they were when the judgment complained of was rendered. In such case they could not be taken by habeas corpus.

State, ex rel. Halligan, v. Clary.

We decline to discuss the merits of the case so far as they relate to the welfare of the children, for that question should be determined by the court which rendered the decree of divorce, on an application to modify the same.

The judgment of the district court is reversed and the cause is dismissed.

REVERSED AND DISMISSED.

SEDGWICK, J., not sitting.

STATE, EX REL. P. R. HALLIGAN, COUNTY ATTORNEY, APPELLANT, v. M. P. CLARY ET AL., APPELLEES.

FILED NOVEMBER 17, 1916. No. 19045.

Counties: CHANGE OF BOUNDARIES. Where it has been attempted to change the county boundary of an unorganized county by a void act of the legislature, and the adjoining county has taken over that portion of territory excluded by the void act, and has exercised jurisdiction over such territory for many years without any attempt being made to prevent it, has levied and collected taxes thereon, organized voting precincts where the votes of the inhabitants have been cast and counted by its officers, organized school districts and conducted schools since its organization, has exercised all of the functions of county government within the disputed strip, and the state government has recognized the line fixed by the void act for more than ten years, the court, in the exercise of sound public policy, will refuse to change such boundary line.

APPEAL from the district court for Garden county:
RALPH W. HOBART, JUDGE. *Affirmed.*

Wilcox & Halligan and *P. R. Halligan*, for appellant.

H. J. Curtis, F. E. Williams and *R. F. Williams*,
contra.

BARNES, J.

This is an appeal from the judgment of the district court for Garden county in a proceeding in *quo war*.

State, ex rel. Halligan, v. Clary.

ranto by which the county attorney of Arthur county sought to have the state oust the officers of Garden county from exercising jurisdiction over a strip of land lying between the twenty-fifth degree of longitude west from Washington and the range line between ranges 40 and 41 west of the sixth P. M., which the legislature of 1895 (Laws 1895, ch. 23) defined as the west line of Arthur county, said strip of land being about 3 miles in width and 24 miles long. The trial court found for the defendants and dismissed the proceeding. The plaintiff has brought the case to this court for review.

Appellant contends that the district court erred in the holding that the boundary line between Garden county and Arthur county was the range line between ranges 40 and 41 west of the sixth P. M. This contention is based largely on the proposition that the legislative act of 1895 defining the boundaries of Arthur county is unconstitutional. The fact that the act of 1895 was a void act may be conceded; but, notwithstanding that fact, it appears that in 1887 the legislature passed an act creating Arthur county and defining its boundaries. At that time Arthur county was unorganized territory, and was attached to McPherson county for election, judicial and revenue purposes. On the 16th day of August, 1913, Arthur county was duly organized under the provisions of an act passed by the legislature of that year. The record shows that in 1888 Deuel county was created out of the east part of Cheyenne county, and the twenty-fifth degree of longitude west from Washington was defined as the east boundary line of Cheyenne county. It further appears that at that time the twenty-fifth degree of longitude west from Washington had not been surveyed, marked out, or established upon the ground, but the range line between 40 and 41 was thought to be such meridian line. Garden county was formed out of the east part of Deuel county, and, at the time Arthur county was created and

State, ex rel. Halligan, v. Clary.

its boundary defined, the twenty-fifth degree of longitude west from Washington was an unknown and imaginary line. No attempt was made by anyone to have it surveyed, determined and marked upon the ground until about the year 1912, when the county of McPherson, to which Arthur county had been attached for revenue, judicial and election purposes, caused the survey to be made and marked by monuments, which survey established the location of the twenty-fifth degree of longitude west from Washington. At the time McPherson county had the twenty-fifth degree surveyed and marked, it claimed to embrace within its own boundaries the entire county of Arthur as a part and parcel of itself, and the monuments placed to indicate the exact location of that line upon the face of the earth were marked on the west side of the unorganized territory attached to McPherson county. This survey was made at the instance of McPherson county, and that county furnished the monuments. That was the first step by the state, or any one, to establish and mark the twenty-fifth degree of longitude upon the face of the earth, and was taken in April, 1912, 17 years after the passage of the act of 1895, and 24 years after Arthur county was created by the legislature and its boundaries defined. Before this line was surveyed and marked, no person traveling westward through Arthur county could tell where that county ceased and Cheyenne, Deuel and Garden counties, in their succession, began, and, while that knowledge was wanting, the legislature, in 1895, sought to remedy the difficulty by redefining and fixing the west line of Arthur county as the line between ranges 40 and 41 west of the sixth P. M., and, whether the act was legal or not, it was sensible and practical, and a recognition by one of the coordinate branches of the state government of that line as the west boundary line of Arthur county and the east boundary line of Deuel county. After the passage of the act of 1895 the state recognized the range line as the west line of Arthur county and the east boundary of Cheyenne,

Deuel and Garden counties. This is evidenced by the fact that the department of public lands and buildings caused the state school lands within the strip to be surveyed, and caused the commissioners of Deuel county to appraise those lands for rental purposes. On August 9, 1899, section 36, in township 17, range 41, was leased, and this lease was transferred to L. F. Fairchilds on November 16, 1908, according to the transcript of the records of Deuel county made for Garden county after its organization. The record of that section of school lands also applies to section 36, township 18, range 41, and section 36, township 19, range 41, and section 36, township 20, range 41, which were leased, and the rentals on the leases were paid in Garden county after its organization and remitted to the commissioner of public lands and buildings. These school lands were reappraised by the board of commissioners of Deuel county, and the appraisement returned to the commissioner of public lands and buildings in November, 1907. When the legislature passed the act of 1895, it recognized the range line as the boundary line between these counties, and every time the legislature has spoken upon the question since that time it has given recognition to it as the boundary line. Again, the commission created by the legislature of 1911 to revise the laws of Nebraska recognized the range line as the boundary line in its report upon revision of the laws, and the legislature in adopting the report approved that recognition. The persons authorized to compile the statutes recognized the act of 1895 as giving the true west boundary of Arthur county, and every volume of the statutes compiled and annotated since 1895 will show that fact. The state treasurer has accepted from Garden county state taxes assessed against property on the strip of land in controversy. The state auditor has certified to the clerk of Garden county each year the lands in the disputed strip which have become subject to patent and thereby taxable. In fact, there is no evidence that the state, or any officer of the state, ever in any way recog-

State, ex rel. Halligan, v. Clary.

nized either McPherson or Arthur county as having any jurisdiction over the territory in question.

Conceding the act of 1895 to have been unconstitutional, it appears that it was for years treated as a valid act, and Garden county, under color of law, after its organization, proceeded to collect the taxes assessed against the inhabitants residing on the strip of land in controversy. School districts have been organized and schools conducted thereon as school districts of Garden county; deeds, contracts and mortgages given to and by the inhabitants residing on the strip have been recorded in Garden county by the county officers; voting precincts have been organized and the votes cast by the residents on that strip have been returned to and counted by the public officers of Garden county. It would lead to needless expense and confusion and would be against public policy to now hold that the twenty-fifth degree of longitude west from Washington is the boundary line between Arthur and Garden counties. To so hold would dismember farms and place parts of them in different counties, and that without regard to section lines as established by government surveys, without any substantial benefit to the public or the inhabitants of Arthur county. It therefore seems clear that the district court did not err in its finding and judgment. *State v. McLean County*, 11 N. Dak. 356; *People v. Maynard*, 15 Mich. 463; *Jameson v. People*, 16 Ill. 257; *Rumsey v. People*, 19 N. Y. 41; High, Extraordinary Legal Remedies (3d ed.) sec. 686.

In *State v. City of Des Moines*, 96 Ia. 521, 31 L. R. A. 186, it was held that the equitable claim of a city to jurisdiction over territory which a void statute has declared to be annexed to it will not be disturbed at the instance of the state without any suggestion of anticipated benefits by so doing, where for more than four years the city has exercised authority over such territory.

In *People v. Alturas County*, 6 Idaho, 418, 44 L. R. A. 122, which was an action in *quo warranto* to exclude

State, ex rel. Halligan, v. Clary.

Blaine county from the exercise of municipal powers within the boundary fixed by the act creating such county, it was held that the people residing within the territory embraced within Blaine county having repeatedly recognized the existence of the county, held general elections therein, participated in by the electors generally, elected county and precinct officers, levied and collected taxes, assumed debts of its predecessors, funded a large indebtedness, brought suits as a county against other counties, and recovered large sums, and exercised all the powers and functions of a county government for a period of nearly four years, under such circumstances the court would decline to examine into the manner of the passage of the act creating the county.

It is therefore apparent that the trial court was not without authority for its findings and judgment, of which the appellant complains. It is true that the record discloses that some few persons residing on the disputed territory paid taxes to the authorities of McPherson county, and that sometimes the question of the jurisdiction of Arthur county over the territory in dispute was discussed; but the great weight of the testimony shows that nearly all the inhabitants residing on the disputed strip fully recognized the authority of Garden county over that territory.

We therefore conclude that the judgment of the district court was right, and it is in all things

AFFIRMED.

SEDGWICK, J., not participating.

Slimmer v. Hoffman.

ABRAHAM SLIMMER ET AL., APPELLANTS, v. P. K. HOFFMAN, APPELLEE.

FILED NOVEMBER 17, 1916. No. 19082.

Judgment: RES JUDICATA. Where a second action for conversion is brought on the same facts declared on in a former suit between the same plaintiffs and one of the defendants in the former case, a judgment in the former suit in favor of all the defendants and against the plaintiffs is a complete bar to the prosecution of the second action.

APPEAL from the district court for Lincoln county:
HANSON M. GRIMES, JUDGE. *Affirmed.*

Muldoon & Gibbs, for appellants.

Wilcox & Halligan, contra.

BARNES, J.

This action was commenced in the district court for Lincoln county against the defendant to recover the damages which plaintiffs alleged they had sustained by the conversion of certain cattle on which plaintiffs had two unpaid mortgages securing two promissory notes given for the purchase price of the cattle above mentioned. The petition was in the usual form and stated a cause of action. The defendant, by his answer, alleged that plaintiffs had commenced an action for the conversion of the same identical cattle described in the mortgages, and in his petition, in the instant case, against the defendant, and had joined with him as co-defendants one John H. Nagel, John Doe, whose real name is unknown, and Clay Robinson & Company; that in the former action issues were joined and a trial was had to a jury in the district court for Lincoln county. It was further alleged in defendant's answer that upon the evidence and the instructions of the court in that suit the jury returned a verdict for this defendant and all of his codefendants; that judgment was duly

Slimmer v. Hoffman.

rendered for the defendants on the verdict; that plaintiff's motion for a new trial was overruled, and no appeal was ever taken; that the judgment thus rendered remains in full force and effect, unsatisfied and unmodified in any respect. Other matters were pleaded in defendant's answer, which need not be referred to in this opinion. In the instant case defendant filed a motion for a judgment in his favor on the pleadings. The motion was sustained, and judgment was so rendered. The plaintiffs have brought the case here by appeal.

The appellants contend that this was a different cause of action, and the judgment in the former case is not a bar to their right to maintain the present suit. The question to be determined on this appeal requires an examination of plaintiffs' petition and the record in the former suit, which is set forth in full in the defendant's answer. From an examination of this record it seems clear that the petitions in the two cases are identical, with the exception of the date of the alleged conversion. In the former case the same cattle are described, the same mortgages and notes are set forth, and the only difference alleged is in the dates when the alleged conversion took place, by the defendants herein, John Doe and Clay Robinson & Company, while in this suit it was alleged that the defendant alone was guilty of the conversion, which is alleged at a subsequent date for the evident purpose of avoiding a plea of former adjudication. From reading the proceedings which are set forth in full in defendant's answer, it appears that in the former suit the same issues were presented as those in the present case. Upon those issues the jury were fairly instructed, and thereupon they returned their verdict for all of the defendants. The rule in such case is that where the second suit is upon the same claim or demand as the first, and between the same parties, the judgment in the former is conclusive in the latter as to any issues which were tried, or which might have been presented, in the former suit. *Schlemme v. Omaha Gas Mfg. Co.*, 4 Neb. (Unof.) 817; *Battle Creek Valley Bank*

State, ex rel. Vannatter, v. McDonald.

v. Collins, 3 Neb. (Unof.) 38; *Yates v. Jones Nat. Bank*, 74 Neb. 734; *Trainor v. Maverick Loan & Trust Co.*, 92 Neb. 821; *Agnew v. Montgomery*, 72 Neb. 9.

In *Blondin v. Brooks*, 83 Vt. 472, it was said: "It is no objection to the application of the rule of *res judicata* that the parties to the former action include some who are not joined in the subsequent action, nor the converse, as the rule is applicable to all who were parties to both actions."

After a careful examination of the record, we conclude that the finding of the district court was right, and the judgment complained of is

AFFIRMED.

LETTON, J., not sitting.

STATE, EX REL. J. F. VANNATTER, APPELLANT, V. KENNETH W. McDONALD, APPELLEE.

FILED NOVEMBER 17, 1916. No. 19610.

County Attorneys: PROSECUTIONS. It is not the duty of a county attorney to appear and prosecute one who is charged with an alleged violation of a village ordinance, where the prosecution is not based on the violation of any law of the state.

APPEAL from the district court for Morrill county:
RALPH W. HOBART, JUDGE. *Affirmed.*

F. E. Williams, for appellant.

Kenneth W. McDonald, *pro se.*

BARNES, J.

This was an application for a writ of mandamus to require the respondent, as county attorney of Morrill county, to prosecute one Anton Cernak for an alleged violation of the provision of ordinance No. 10 of the village of Bridgeport, in said county. The district court allowed

State, ex rel. Vannatter, v. McDonald.

an alternative writ, and on the return thereto, after a hearing, the court rendered judgment for the respondent and dismissed the relator's petition. The relator has appealed.

The ordinance alleged to have been violated provides that it shall be unlawful for any person or persons to disturb the peace and good order of the village of Bridgeport by making any loud or unusual noise within the limits of said village, or fighting or threatening to fight, or by offensive or indecent exposure of the person, or by being intoxicated on any street or other public place, or in any private place, or by using any obscene, loud or profane language in any street or other public place in said village, to the annoyance of any person therein. It also provides that any person or persons guilty of violating any of the provisions of the ordinance shall, upon conviction thereof, be fined in any sum not less than \$1 or more than \$10 and costs of prosecution, and shall stand committed until such fine and costs are paid.

In disposing of the case the trial court made the following finding: "(6) The court further finds that it is not a duty imposed upon the defendant as county attorney to prepare, sign, verify and file such complaint as demanded by the plaintiff, and to appear and prosecute the same in the name of the state of Nebraska in a court having jurisdiction thereof for the violation of said ordinance, or any ordinance of the said village of Bridgeport, and that the defendant was justified in refusing to prepare, sign, verify and file said complaint under the ordinance of the said village of Bridgeport, and therefore finds that the peremptory writ of mandamus should be refused, and that the petition of the relator should be dismissed at his cost."

This finding of fact correctly disposes of the relator's contentions. The ordinance in question is no part of the general laws of this state, but is a municipal regulation adopted by the village of Bridgeport to conserve the peace and good order within the village limits. It provides no punishment for its violation other than a fine, and cannot

State, ex rel. Vannatter, v. McDonald.

be said to be one of the public criminal laws of the state. Neither the state nor the county is liable for the costs incurred in the prosecution for its violation. *Sutton v. McConnell*, 46 Wis. 269; *Chafin v. Waukesha County*, 62 Wis. 463; *State v. Grove*, 77 Wis. 448; *State v. Lee*, 29 Minn. 445; *State v. Robitshek*, 60 Minn. 123, 33 L. R. A. 33. It appears by the notes to *State v. Robitshek*, 33 L. R. A. 33, that the great weight of authority sustains this view.

The relator contends that because Cernak was claimed to have been intoxicated within the limits of the village, under the provisions of section 3872, Rev. St. 1913, he was guilty of a misdemeanor, and the respondent was required to appear and prosecute the case. The answer to this contention is that it was sought to compel the respondent to appear and prosecute for a violation of the village ordinance, and not for a violation of section 3872, *supra*.

It is further contended that under the law announced in *City of Brownville v. Cook*, 4 Neb. 101, it was the duty of the respondent to prosecute Cernak. As we view that decision, but two questions were there considered: (1) Had the village of Brownville the power to pass the ordinance under which the prosecution was commenced? (2) Should the prosecution have been conducted in the name of the municipality or in the name of the people of the state of Nebraska? The question here presented was not considered in that case.

Section 5597, Rev. St. 1913, provides: "Each county attorney shall appear on behalf of the state before any magistrate, and prosecute all complaints made in behalf of the state of which any magistrate shall have jurisdiction, and he shall appear before any magistrate and conduct any criminal examination which may be had before such magistrate and shall also prosecute all civil suits before such magistrate in which the state or county is a party or interested." The duty to prosecute, as prescribed by the section above quoted, relates to cases where

Crancer Co. v. Cooper.

the charge is a violation of the public laws of this state, and in our opinion does not require the county attorney to appear and prosecute in proceedings for a violation of village ordinances.

The judgment of the district court was right, and is
AFFIRMED.

SEDGWICK and HAMER, JJ., not sitting.

G. A. CRANCER COMPANY, APPELLANT, v. PARIS G. COOPER,
APPELLEE.

FILED NOVEMBER 17, 1916. No. 19643.

Sales: DESCRIPTION OF PROPERTY: SUFFICIENCY: QUESTION FOR COURT OR JURY. Whether the description in a contract of conditional sale, together with the other inquiries which the contract itself suggests, is sufficient to enable third persons to identify the property is ordinarily a question of fact for the jury; but, where only one conclusion can reasonably be drawn from the evidence, it is a question for the court.

APPEAL from the district court for Dawes county:
WILLIAM H. WESTOVER, JUDGE. *Reversed, with directions.*

Field, Ricketts & Ricketts, for appellant.

Earl McDowell and Fisher & Rooney, contra.

BARNES, J.

When this case was before us the first time, the judgment appealed from was reversed and the cause was remanded. *Crancer Co. v. Cooper*, 98 Neb. 153. The syllabus is as follows:

"1. In a contract of conditional sale duly filed of record, a description which will enable a third person, aided by inquiries suggested by the instrument itself, to identify the property is sufficient.

"2. The public filing of a contract of conditional sale, in the county wherein the purchaser resides, protects the

seller, though the former removes the property to another county."

When the case came on again for trial, by stipulation of the parties, it was submitted to the court without a jury on the same record and the same evidence adduced on the first trial. The court found for the defendant and rendered his judgment accordingly, and the plaintiff has prosecuted a second appeal.

It is now contended that the court below erred in his finding and judgment because all of the questions involved in the controversy were conclusively settled by our former opinion, which has become the law of the case. By referring to our opinion, we find that we said, after passing on the sufficiency of the record to establish constructive notice of the plaintiff's ownership of the piano which was replevied that this was a question for the jury. The statement that the question was one for the jury was perhaps misleading as applied to the facts of this case. The correct rule which it was intended to invoke is stated in *Iowa Savings Bank v. Dunning & Hartson*, 37 Neb. 322, cited in the former opinion: "Whether the description of property in a chattel mortgage and the other inquiries which the mortgage itself suggests are sufficient to enable third persons to identify the mortgaged property is a question of fact for the jury." But, like all issues of fact, where but one conclusion can reasonably be drawn from the evidence, the question is one for the court.

In the case at bar, the evidence showed conclusively that the piano replevied was the one sold by plaintiff to the Springers; that plaintiff never sold them any other piano; and, with the single exception of the factory number of the instrument, it was correctly described in the conditional sale note given for a renewal of the original one, which contained the correct number. Both notes were filed and recorded in the records of Cheyenne county, where the Springers were living at that time. It follows that, this court having held that the record in the former appeal was sufficient constructive notice of the plaintiff's

In re Estate of Enyart.

rights, there was but one thing for the trial court to do, which was to find for the plaintiff, and render his judgment accordingly. For this reason, the judgment of the district court is reversed, with directions to render judgment for the plaintiff.

REVERSED.

IN RE ESTATE OF LOGAN ENYART.

KATHERINE ENYART, APPELLEE, v. ALBERT F. ENYART
ET AL., APPELLANTS.

FILED NOVEMBER 17, 1916. No. 18966.

1. **Appeal: ADMISSION OF EVIDENCE.** The admission of incompetent evidence in a case tried without a jury does not furnish ground for the reversal of a judgment, provided that there is sufficient competent testimony in the record to convince this court that the judgment of the trial court is right.
 2. **Husband and Wife: ANTENUPTIAL CONTRACTS.** Courts will rigidly scrutinize an antenuptial contract apparently unjust, especially where it deprives the wife of her interest in the husband's estate without providing for her in case she survives him.
 3. ———: ———: **VALIDITY: BURDEN OF PROOF.** The burden is upon the husband, or his representatives, to show that an antenuptial contract apparently unjust to the wife was fairly procured.
 4. ———: ———: ———. In view of the close and confidential relation existing between affianced persons, it is the duty of the prospective husband to make a full and fair disclosure of all material facts relating to the amount, character and value of his property, so that the prospective wife may have sufficient knowledge upon which she may exercise her judgment whether she will enter into such a contract.
 5. ———: ———: ———: **BURDEN OF PROOF.** Where the provision made for the intended wife by an antenuptial contract is grossly disproportionate to the interest in the prospective husband's estate which the intended wife would acquire by operation of law in case a marriage took place, the burden rests upon those claiming the
- 100 Neb.—22

In re Estate of Enyart.

validity of the contract to show that a full and fair disclosure was made to her before she signed it of the extent and value of the property, or that she was aware to all intents and purposes of the nature, character and value of the estate which she was relinquishing if the marriage took place.

6. ———: ———: ———. The mere fact that an intended wife who signs an antenuptial contract knows in a general way that the husband is reputed to be a wealthy man and to own farms and an interest in banks is not sufficient to meet the requirements of the equitable rule of fair disclosure, or charge the wife with such knowledge of the nature and value of his property as to render an unfair contract binding upon her.
7. **Parol Evidence: ADMISSIBILITY.** Where a contract is uncertain and ambiguous in its terms, facts may be received in evidence to show the construction placed upon it by the parties.
8. **Witnesses: COMPETENCY: PRIVILEGED COMMUNICATIONS.** Where checks paid to the wife and receipts signed by her for annual payments provided for in an antenuptial contract have been received in evidence on behalf of the representatives of the deceased husband, the widow may testify to facts with reference to the same transactions.
9. **Wills: ELECTION.** A statute fixing the time within which a widow must elect whether to take the provisions made for her in his lifetime by her husband or to recover her dower or other provisions made for her by statute pertains to the remedy, and, if the widow made her election in conformity with the statute in force at the time of her husband's death or the filing of her election, this is sufficient.
10. **Husband and Wife: ANTENUPTIAL CONTRACT: INVALIDITY.** Under the facts in this case, *held*, that the antenuptial contract in question is invalid for the reasons set forth in the opinion.

APPEAL from the district court for Otoe county: JAMES T. BEGLEY, JUDGE. *Affirmed*.

Jesse L. Root, L. F. Jackson, George W. Berge, Matthew Gering, John C. Watson, W. W. Wilson and D. W. Livingston, for appellants.

Paul Jessen, B. F. Good, William H. Pitzer and Edwin Zimmerer, contra.

In re Estate of Enyart.

LETTON, J.

Appeal from a judgment of the district court which affirmed an order of the county court of Otoe county awarding Katherine Enyart, the widow of Logan Enyart, an allowance of \$200 a month pending the settlement of the estate of her deceased husband. The appeal is taken by the administrator and the heirs and devisees of Logan Enyart, deceased. The question as to whether such allowance should be made has been made by the parties to depend upon the validity of an antenuptial agreement entered into by the parties. The estate of the deceased is a valuable one, and, while the amount involved in the present issue is comparatively small, the decision in the case is of great importance, as it affects the disposition of much valuable property. The contract is as follows:

"State of Nebraska.

1898 A. D.

"This article of agreement made this 2d day of April, 1898, by and between Logan Enyart of Otoe county, state of Nebraska, being the party of the first part, and Katherine Richardson of Otoe county and state of Nebraska, being the party of the second part, witnesseth:

"That the aforesaid parties above named have this day mutually agreed to enter into a marriage contract for their betterment, for their own social happiness during their natural lives, until death separate them, to be solemnized by marriage. This agreement shall be construed both in law and equity as a marriage contract, to govern both parties. It is made in lieu of any dower interest, claim or rights of whatever name, kind or nature that might arise by law or equity from a marriage between the parties above named, as full consideration of the second party's interest.

"The party of the first part has agreed to pay to the party of the second part, to her only, the sum of \$10,000 (ten thousand dollars) in installments of (\$500) five hundred dollars annually upon the anniversary of this agreement. It is further agreed that the party of the second

In re Estate of Enyart.

part shall sign all deeds or conveyances requested by the party of the first part.

"Now it is expressly understood by both parties, that the above sum is all that the party of the second part shall ever claim off of the party of the first part or his estate from marriage.

"This agreement shall not prevent the first party from giving anything by check, deed or bequest that he may desire to the party of the second part, for kindness, love and affection.

"In witness whereof the said parties have set their hands and seals the day and year first written.

"The words 'to her only' means to herself.

"Logan Enyart. (Seal)

"Katherine Richardson. (Seal)

"Witness as to the signatures:

"J. H. Catron.

"Geo. W. Hawke."

This contract was acknowledged before Mr. Hawke, who was a notary public.

Objections to the claim were filed in the county court by the appellants, which set forth the antenuptial contract and pleaded that it was valid; that the contract was entered into in contemplation of marriage, for the purpose of making settlement of all property rights; that \$7,500 has been paid on the contract; that Enyart gave to his wife in money and real estate before his death under the last clause of the agreement property of the value of \$90,000; and gave about \$40,000 worth to her daughter and grandson.

By reply Katherine Enyart denies that the conveyance and gifts to her were made under and in pursuance of the contract; denies that she ever received or retained any benefits under it; alleges that she had no knowledge of Enyart's business affairs or property at the time of marriage more than that he was able to comfortably provide for her, and that, being ignorant of her rights, and having no information as to the amount and value of his

In re Estate of Enyart.

property, she signed the contract; that at the time, Enyart was worth nearly \$300,000 and by reason of the facts she was defrauded of her marital rights; that afterwards her husband contended that the contract relieved him of any obligation to support her and other members of her family; that the contract is contrary to public policy and void; that the money paid to her by Enyart during his life had been spent for the support and maintenance of the family and the furnishing and supplying his home; that deeds to certain real estate delivered to her which were placed for safekeeping in a bank at Nebraska City were altered by inserting a clause that they were made in lieu of dower in Enyart's estate, which clause was inserted subsequent to delivery, and without her consent; that she has refused to accept the deeds or to claim title thereunder with said clause therein. She tenders these deeds to the administrator "until the validity of the clause which was placed in said deeds, without her knowledge or consent, can be determined." She also tenders a note for \$10,000, signed by Enyart, payable to herself, and found with his papers after his death.

A number of assignments of error are relied upon for a reversal of the judgment of the district court. The first six of these relate to the alleged errors in receiving incompetent evidence. The remaining assignments are practically embraced within the contention that the decree upon the evidence should have been for the appellants.

The assignments of error with regard to the introduction of testimony must be overruled. We have repeatedly held that in a trial before a judge the admission of incompetent evidence does not furnish ground for the reversal of a judgment, provided that there is sufficient competent testimony in the record to convince this court that the judgment of the trial court is the judgment which should have been rendered upon the evidence. *Smith v. Garbe*, 86 Neb. 91; *Clark Implement Co. v. Wiltfang*, 87 Neb. 796; *Kemmerling v. State*, 89 Neb. 98; *Smith Bros. v. Wood-*

In re Estate of Enyart.

ward, 94 Neb. 298. This is practically conceded in the brief of appellants.

Does the evidence justify the decree? The record is very voluminous, consisting of nearly 2,000 typewritten pages. The printed briefs cover 369 pages. Yet, the principles which determine the case are few and simple. We think it unnecessary to set out more of the evidence than its substance as to the incidents preceding the execution of the contract, since in our view the contract itself, when considered in connection with all the circumstances of its execution, furnishes sufficient data wherewith to test its validity.

In 1898, at the time of the marriage, Logan Enyart was a man of large means, owning several farms and a great deal of other property in this and other states. It is stipulated that at this time he was worth about \$225,000. His first wife died in March, 1896. He was 68 years of age, and had no children. It was his custom when he visited Nebraska City, near which the farm upon which he resided was situated, to make his headquarters at a certain hotel. The appellee, then Katherine Richardson, was living at this hotel, where her husband had deserted her. She was about 34 years of age, and had a daughter about 15 years old. It was necessary for her to support herself and child. She assisted in the work in the hotel, and was treated practically as one of the family of the proprietor. She lived in the hotel for about two years after her husband deserted her, and during this time procured a divorce. Part of the time she was employed in a millinery store and in a dress-making shop, but she worked at the hotel mornings and evenings. Enyart and the hotel proprietor were intimate friends, and when he came to the hotel he often was served at the family table, where Mrs. Richardson also sat. About a year before the marriage the parties became acquainted. After several months time, during which she often met Enyart at the hotel, Mrs. Richardson went to Auburn to act as housekeeper for a family there. She was gone about six months, and was visited by Enyart twice while there.

In re Estate of Enyart.

She came back to the hotel from Auburn about a week or two before the marriage, announced her engagement, and lived at the hotel until the marriage took place.

Two days before the marriage Enyart, using a form book in part, dictated to Mr. Catron, a business associate and confidential friend, who reduced it to writing, the essential features of the contract. On the same day, at Enyart's request, Mr. Catron went to the hotel for Mrs. Richardson and brought her to his own home, where Enyart was waiting with Mr. Hawke, the notary, who was also a close friend of his. The proposed contract was read, either by her or to her, and it was there signed by both parties.

The contract was kept by Mr. Enyart, and was filed for record in December, 1902, in the office of the register of deeds of Otoe county. Enyart died on November 9, 1912. He made two wills and also left a large amount of valuable property undisposed of by will. One will disposed of certain property in Colorado and other states in which he had a partnership interest with his brother, A. F. Enyart. The will gave the brother all of this except \$5,000, which was directed to be paid to the widow. The other will gave his interest in a cattle company owning 2,840 acres of land in Nebraska to six persons, Hazel R. Black, Mrs. Enyart's daughter, being one of them.

Whether an antenuptial contract, by virtue of which one party to an intended marriage, for a legal consideration, parts with marital rights in the property of the other, may be valid and a bar to dower has been settled in this state. *Rieger v. Schaible*, 81 Neb. 33. In fact, most courts now support antenuptial contracts if fairly made. Such instruments frequently tend to peace and happiness by settling questions concerning rights of property which, especially in the case of marriage of people in later life having children of a former marriage, often furnish grounds of irritation and friction which may defeat the very purpose of the union.

Considering the facts properly in evidence, was the antenuptial contract entered into between Logan Enyart and

In re Estate of Enyart.

Katherine Richardson, at the time it was made, fair, just, reasonable, and such a one as the courts, in view of all the circumstances of both parties at that time, should recognize and enforce?

In *Rieger v. Schaible*, 81 Neb. 33, 49, after a careful examination and review of many cases, it is said: "We think the rule deducible from the authorities under review is that in equity an antenuptial contract, in consideration of marriage and the release by each party of all interest in the property of the other, is based upon a sufficient consideration as to both parties, when each is the owner of an estate in which the other would acquire an interest by reason of the marital relations but for the antenuptial agreement, and is sufficient, *when equitable and fair in its terms and entered into in good faith*, to constitute an equitable bar to dower." The opinion quotes 21 Cyc. 1249: "An antenuptial agreement wherein the intended wife releases 'all claims against the estate of the intended husband although valid when fairly made, will be most rigidly scrutinized, and, if the circumstances show that she has been deceived, it will be set aside.'" The contract was held under the facts in evidence to be valid, but the court say: "In this respect, however, and before passing from this branch of the case, it might be well to state that a court of equity, when called upon to consider an antenuptial contract, should examine and construe the instrument in the light of the circumstances surrounding that particular case, and enforce or annul the agreement according to the facts disclosed in the case before it. No arbitrary rule can be laid down which would apply to all antenuptial agreements." This is the proper rule, to which we adhere.

While there are decisions of courts of high authority which hold that marriage alone furnishes a full and sufficient consideration for the release by an intended wife of her rights of dower and of all other rights she would obtain by virtue of the marriage relation, even when no provision is made for her support and welfare after the death of the husband, yet we are convinced that the better

In re Estate of Enyart.

rule is laid down in *Rieger v. Schaible, supra*. This is the doctrine laid down in the following cases, and others that could be cited: *Murdock v. Murdock*, 219 Ill. 123; *Mines v. Phee*, 254 Ill. 60; *Simpson v. Simpson's Ex'rs*, 94 Ky. 586; *Tilton v. Tilton*, 130 Ky. 281; *Slingerland v. Slingerland*, 115 Minn. 270; *In re Estate of Pulling*, 93 Mich. 274.

It is also a well-established rule that, in view of the close and confidential relation existing between affianced persons, it is the duty of the prospective husband to make a full and fair disclosure of all material facts relating to the amount, character and value of his property, so that the prospective wife may have sufficient knowledge upon which she may exercise her judgment whether she will enter into such a contract. The general principle was laid down in *Kline v. Kline*, 57 Pa. St. 120, 98 Am. Dec. 206, by Judge Sharswood, and has been adopted and applied in many cases. *Pierce v. Pierce*, 71 N. Y. 154; *Lamb v. Lamb*, 130 Ind. 273; *Murdock v. Murdock, supra*; *Warner v. Warner*, 235 Ill. 448; *Simpson v. Simpson's Ex'rs, supra*; *Slingerland v. Slingerland, supra*; *Rankin v. Schiereck*, 166 Ia. 10.

Where the provision made for the intended wife by an antenuptial contract is grossly disproportionate to the interest in the prospective husband's estate which the intended wife would acquire by operation of law in case the marriage took place, the burden rests upon those claiming the validity of the contract to show that a full and fair disclosure was made to her before she signed it of the extent and value of the property, or that she was aware to all intents and purposes of the nature, character, and value of the estate which she was relinquishing if the marriage took place. *Murdock v. Murdock, supra*; *Warner v. Warner, supra*; *Mines v. Phee, supra*; *Warner's Estate*, 207 Pa. St. 380. These principles, though not universally accepted, seem to us to be based upon sound reason, and to be most consonant with the trend of judicial thought, more particularly in the western states. 14 Cyc. 940; 21 Cyc. 1250.

In re Estate of Enyart.

The evidence is convincing that Mrs. Richardson knew before the marriage that Enyart was a wealthy man owning farms and interests in banks and other property, but that she was informed with any degree of definiteness as to his actual possessions and their value is very doubtful indeed. It appears that a large part of Enyart's wealth lay in other states, and there is no proof that the intended wife had any knowledge of this, other than that he had an interest in a ranch in Colorado. The mere fact that she knew in a general way that Enyart was reputed to be a man of means is not sufficient to meet the requirements of the equitable rule of fair disclosure, or to charge her with such knowledge of the nature and value of his property as to render such a contract binding upon her. On this point appellants have not sustained the burden of proof. *Murdock v. Murdock, supra*; *Warner v. Warner, supra*; *Mines v. Phee, supra*.

At the time the contract was entered into Enyart's expectancy of life is shown to have been 10.23 years, and that of Mrs. Richardson to be 31.68 years. In all probability it was to be expected that she would survive him, and would also survive the expiration of the annual payments to be made under the contract. If she should live the period of her expectancy, she would receive nothing from the estate for more than 11 years before her decease.

The agreement is to pay \$10,000 at the rate of \$500 annually on April 2 of each year. This is equivalent to the payment of the annual interest on \$10,000 at 5 per cent. for 20 years. At the end of this time Enyart or his estate would still have the \$10,000 having merely parted with the usufruct. For the income of \$10,000, therefore, for 20 years, which is more than 10 years less than her expectancy, Mrs. Richardson surrendered not only all interest in Enyart's real estate, but further agrees "that the above sum is all that the party of the second part *shall ever claim off of the party of the first part* or his estate from marriage." Such a provision was so disproportionate to the wealth of Enyart as to require those asserting its validity

In re Estate of Enyart.

to sustain the burden of proof that it was entered into with full knowledge on the part of Katherine Richardson of the nature, extent and character of Enyart's estate. Without this knowledge she could form no adequate idea of the problem before her, whether it were better to marry for a home and a pittance, or to refuse to marry unless provisions were made appropriate to her condition in life as the wife of a man of wealth, standing and importance in the community. We are satisfied this burden has not been met.

Furthermore, the contract is ambiguous in its terms. It is left to conjecture whether "all that party of the second part shall ever claim off of the party of the first part from marriage" means, shall claim during his lifetime after proper marital and legal support and maintenance have been provided for her by the husband. It is uncertain whether the annual payment is to be in addition to her reasonable maintenance, or is intended to limit the amount of maintenance to be supplied her. If it means that this sum is to furnish maintenance and support, pay for clothing, household furniture, and necessities, then the prospective wife gets practically nothing, for marriage imposes the duty of so providing on the husband. The meaning being uncertain, the construction placed upon contract by the parties themselves may be looked to in order to make clear that which is doubtful. *Becker v. Linton*, 80 Neb. 655. A vast amount of evidence on this point is in the record, and it is clearly established that Enyart intended that out of the annual payments his wife should pay for her own clothing and other necessities, that he considered that much of the expense for proper furnishings for the home should be defrayed from this annuity, and that he often deducted the amount of bills he paid for such purposes from the amount for which the receipt was given. Receipts signed by Mrs. Enyart for some of these payments were received in evidence for the appellants. This opened the door for Mrs. Enyart to testify as to how the payments were made. *Cline v. Dexter*, 72 Neb. 619. While it appears

In re Estate of Enyart.

that Katherine Richardson desired to marry for a home for herself and daughter, and it is very probable that, even if fully informed as to Enyart's estate, she still would have signed it, the contract, construed as Enyart intended it to mean, is unconscionable, not in accordance with the duties which the law imposes upon a husband in the marital relation, and its terms are such that it ought not to be enforced. *Isaacs v. Isaacs*, 71 Neb. 537.

After marriage Mr. and Mrs. Enyart lived together for 15 years, and in his later days Mr. Enyart showed his appreciation of his wife by generous gifts to her and to her daughter and grandchild. He was generous also with several of his own relatives and others. While his estate was depleted to some extent by these gifts, there is still a fortune left to be disposed of.

It is claimed Mrs. Enyart is estopped to claim any share in the estate for two reasons: (1) That she has accepted and retained provisions made for her under the contract and under the will of Mr. Enyart; (2) that she failed for more than one year after his death to signify her desire to take under the law, and not by will. As to the first point, Mrs. Enyart has been paid \$500 a year for 15 years, and of this money a large portion has been devoted to the purchase of articles it was the duty of Enyart to supply. There is no proof of investments made with it and now held by her, but, even if there were, the amount invested would perforce be small as compared with his estate. Furthermore, she has refused to accept the provisions made by will, and a note for \$10,000 payable to her found among her husband's effects after his death. She is clearly not estopped by ratification as to the money received by her under the contract, the legacy, and the note. As to the deeds made in his lifetime there is nothing to show that they were made in pursuance to the contract or in contemplation of it, except by inference. It is as easy to infer that these gifts were made to her prompted by sound, generous motives as the valuable gifts that were made to his own relatives and others. The gifts to her daughter

In re Estate of Enyart.

and grandson, members of the household, are attributable to like impulses, and there can be no estoppel on Mrs. Enyart's part by reason of these gifts and their acceptance by the donees.

We come, now, to the contention that it was the duty of the claimant to elect within one year after her husband's death, under the statute in force at the time of the contract, whether she would take under the will or under the law. There is no vested interest in a statute, and a change in the manner of disposition of estates of deceased persons may be made by the legislature at any time. The law at the time of death determines the right and manner of disposition, and not the former law. The statute referred to (Ann. St. 1903, sec. 4918) provided that the widow should be deemed to have elected to take under the provisions made for her by jointure or other provision, unless within one year after her husband's death she commence proceedings for the recovery of dower. The statute (Rev. St. 1913, sec. 1272) now provides that she shall be held to take such provisions unless she file in the county court within one year after letters testamentary are issued a refusal in writing to take real estate or other provisions made for her. This was done by Mrs. Enyart by filing a written refusal so to take on September 3, 1913, within one year after Enyart died.

In this case it is to be remembered the intended wife had no property, and the intended husband had a great deal of property and had no children. In cases where each party was the owner of property, the release of all marital rights in the property of the other furnished an additional consideration or incentive to that of marriage for the making of the contract. Each case must be determined on its own peculiar facts, and an analysis of many of the cases cited by appellants shows such a different state of facts from those in this case that they afford no aid in its determination. Other cases seem to hold that the status of wedlock to be conferred upon a woman justifies an unconscionable surrender by her, in advance of the marriage, of the rights

Sadt v. Sunderland Bros. Co.

and privileges which law and custom has conferred upon a wife. We prefer to follow the line of cases cited in this opinion.

We believe the judgment of the district court is the proper one on the facts, and it is, therefore,

AFFIRMED.

ROSE, J., dissents.

JOSEPH SADT, APPELLEE, v. SUNDERLAND BROTHERS COMPANY, APPELLANT.

FILED NOVEMBER 17, 1916. No. 19031.

Master and Servant: INJURY TO SERVANT: APPEAL: REVIEW. In this an action by a servant to recover for personal injuries sustained by the alleged negligence of the master, the evidence is examined, and held to sustain the verdict, and no error is found in the giving or refusing of instructions.

APPEAL from the district court for Douglas county: GEORGE A. DAY, JUDGE. *Affirmed.*

Gurley, Woodrough & Fitch, for appellant.

Mahoney & Kennedy, contra.

LETTON, J.

Action for damages for personal injuries. Plaintiff recovered judgment. Defendant appeals.

The plaintiff, who is a Syrian, was employed as a day laborer by the defendant, who is a dealer in building materials and maintains yards in the city of Omaha. While plaintiff and another Syrian, named Ebdouch, were shoveling sand out of a car, defendant's foreman attempted to move another car, loaded with sand, which was standing upon the same track about 200 feet from that in which the men were at work. The track sloped downward from where the car stood to the car which the men were un-

Sadt v. Sunderland Bros. Co.

loading. The negligence charged is that the defendant negligently set in motion the loaded car and caused it "to be suddenly and violently precipitated against the sand car on which plaintiff was busily engaged as before-described," whereby plaintiff was thrown down and severely injured.

The foreman testified that before he started the car he looked at the brake shoes, which were apparently set against the wheels. He climbed on the car, taking a pick handle with him to use as a brake stick to put in the wheel to give more leverage. He then called to the man who had the lever or jack to start the car while he kept the brake on to try it. This was to test the brakes. He testifies, then "I got down and *removed the blocks from under the wheels*. I got back on the car, and told him to push, * * * to use his jack." He says that he released the brake when the car was started, and that after the car had advanced five or six feet he tried the brake again and it would not hold; that there was only one way to try the brake, and that was to wind it up, which he did, and it refused to work. He then called to Mr. Hurt, the superintendent of the yard, and told him the car was going. Hurt put boards under the wheels to try to stop the car, without success. They both shouted to the men near and about the car to look out. The car continued to move rapidly until it struck the car in which the plaintiff and Ebdouch were standing. Ebdouch saw the car coming, braced himself, and was not hurt; but plaintiff, probably engrossed with his work, did not hear the alarm in time, and when the collision took place was thrown down and quite severely injured. When Hurt saw he was unable to stop the car, he ran to where a team was tied to a car beyond the car in which the plaintiff was working, untied the team, and got it away before the collision occurred. Several bystanders testify that they heard Hurt and Eastman shouting. Ebdouch testified that when he first saw the run-away car it was standing on the track about a block away, that when he next saw it it was within six

Sadt v. Sunderland Bros. Co.

feet of the car in which he was working, and coming rapidly. Plaintiff also testified that he did not see the car at all, and was not aware of its presence until Ebdouch called to him, and that moment the car was struck. There is some conflict as to how the plaintiff faced while at work. Some witnesses say he was looking west to the approaching car. He says he was looking south and east until Ebdouch called, and he then looked west.

The court left it to the jury, by its instructions, to say whether the defendant's foreman had used proper and reasonable care in the starting of the car, in the methods and manner employed for moving the car and controlling its progress, and in notifying plaintiff of the movement of the car. It refused to give an instruction to the effect that "the undisputed evidence shows that the car in question was inspected and started and handled in the usual and customary way of inspecting, starting and handling cars under similar conditions, and in like businesses as that of the defendant. And you are therefore instructed that the evidence fails to show that the defendant was guilty of negligence." The giving of the first and the refusal to give the second of these instructions is complained of. We are satisfied that there was no error in these rulings. The foreman's own evidence shows that the wheels of the car were blocked when he ordered the man with the jack to start the car in order to see if the brakes held. The question of negligence was one for the jury, and the evidence justified a finding that proper care had not been exercised in inspecting and testing the brakes. The instruction refused, by its terms, virtually took the case away from the jury, and was properly rejected.

It is complained that the amount of damages awarded is grossly excessive. The jury returned the verdict in favor of plaintiff for the sum of \$5,275. Plaintiff is a common laborer 52 years of age. There is testimony that he had worked off and on for the Omaha Gas Company for about two years, but that he was discharged in December,

Sadt v. Sunderland Bros. Co.

1913, because he was in such physical condition that he was unable to do the work of the other men in the gang, and that while working he had complained of pain in his side. He was in St. Joseph's hospital from January 8, 1914, until February 16, for treatment for a growth on his lip and other minor troubles. The injury complained of was received on June 11, 1914. The medical testimony in his behalf showed that immediately after the accident he seemed to be suffering from shock. He was taken to the hospital, where he remained about six weeks. For some time he could retain nothing upon his stomach without suffering pain; even liquids were distressing to him. He passed bloody urine, and there was blood present in his vomit, indicating a rupture of the blood vessels in the lining of the stomach. The nerves of the right shoulder were injured so that the muscles have shrunk to a noticeable degree, and he has suffered intense pain. The X-ray showed a clot of blood in the region of the left kidney. The doctor who attended him says that he thinks he will never permanently recover from the injuries. He usually earned \$2 a day. It is shown that at the age of 52 an annuity payable annually, at current rates, costs \$1,340 for each \$100. The plaintiff testifies that he is unable to work on account of pain in his side and shoulder, and there seems to be no proof to the contrary. His testimony in some minor and collateral matters seems not to be strictly in accordance with the facts. This may be on account of lack of full understanding of the English language and inability to express himself in it clearly. But, conceding the inaccuracy, there seems to be little or no dispute as to the cause or the nature of the injury. After his medical and hospital bill are paid he will have about \$5,000 left, which is not so excessive a recovery as to justify interference with the verdict.

AFFIRMED.

ROSE and SEDGWICK, JJ., not sitting.

Grayson v. Maryland Casualty Co.

ROBERT O. GRAYSON, APPELLEE, v. MARYLAND CASUALTY
COMPANY, APPELLANT.

FILED NOVEMBER 17, 1916. No. 19038.

Insurance: VERDICT: SUFFICIENCY OF EVIDENCE. Evidence examined,
and held insufficient to sustain the verdict.

APPEAL from the district court for Douglas county:
ALEXANDER C. TROUP, JUDGE. *Reversed.*

Montgomery, Hall & Young, for appellant.

F. A. Mulfinger and Robert J. Webb, contra.

LETTON, J.

Action to recover on policy of burglary insurance.
Plaintiff recovered, defendant appeals.

The policy was issued to one Rogers, a liquor dealer in Omaha, and was afterwards assigned by him to plaintiff when the latter purchased the saloon. The policy is for \$500. It contains the provision that the insurer shall not be liable "for loss of money * * * from a combination fire and burglar-proof safe, or from a burglar-proof safe, containing an inner steel burglar-proof chest, unless the same shall have been abstracted from the steel or so-called burglar-proof chest contained within the safe, after entry into said chest has been effected by the use of tools or explosives directly thereupon."

The evidence on the part of the plaintiff is substantially to the effect that he left his saloon about 7:30 p. m. on May 13, 1913. He came back a few minutes before 9. The window and show case were broken, the room in disorder, and the window sash raised. He telephoned to the police station, and within a few minutes two policemen came. He afterwards opened the outer door of the safe, put some money in, but not in the steel inner safe, and locked it. The next morning he opened the outer door, took the money out, when he saw that the inner safe had been opened. He

Grayson v. Maryland Casualty Co.

noticed a drill mark and some abrasions on the inner door. There were two fifty-dollar bills in the money chest, and \$500 in gold, which was all taken. The combination was the same as when he received the safe from Rogers. On cross-examination he said he noticed no mark on the dial when the insurance adjuster went with him to examine the safe; first saw it a week or ten days afterwards; that the saloon was open when he left, and that his employees were still there; that the closing hour was 8 o'clock. A witness who testified to being an expert locksmith and safe expert, and who examined the same only on the day of the trial, testified to seeing a drill mark on the dial about a thirty-second of an inch deep and one-quarter of an inch wide, and a mark or abrasion just above the dial; that the drill mark had nothing to do with opening the inner door; that in his opinion the knob had been struck with a hide-faced mallet so as to bend the shaft or spindle and allow the combination to be manipulated so as to open the door. One of the policemen testified that he could not remember whether he saw any marks on the safe that night. The other was not called. A number of safe experts were called by the defendant, who examined the safe in 1914, and found the drill mark, but no other marks or indications of the use of a hammer. They agreed that the shaft or spindle was not bent; that, if the combination had been turned far enough so as to throw the tumblers, the drill mark on the door could not affect the lock at all. Defendant's adjuster testified that he examined the lock carefully in plaintiff's presence on the morning of June 5, 1913; that he found no marks of any kind on the safe or on the door; that he asked plaintiff if he saw any marks, and he said he did not, and that "they must have found the combination." He then showed plaintiff the clause in the policy that made indemnity payable only when the steel chest had been opened by tools or explosives. He examined the safe again in December, 1914, and found the little drill hole in the dial. Another witness who examined the safe during the trial, and after plaintiff's expert had

Vetter v. Broadhurst.

examined it, testified there was a glaze finish on the inner door, and that there were no marks upon it other than the drill mark. On rebuttal plaintiff denied saying the safe was opened by the combination.

The evidence is unsatisfactory and it does not sustain the verdict on the point that entry into the inner chest had "been effected by the use of tools directly thereupon." Under the contract this is essential to a recovery.

The judgment of the district court is reversed and the cause remanded.

REVERSED.

SEDGWICK, J., not sitting.

ANDREW VETTER ET AL., APPELLEES, v. NATHAN BROADHURST, APPELLANT.

FILED NOVEMBER 17, 1916. No. 19315.

1. **Eminent Domain.** The right of eminent domain cannot be exercised for a purely private purpose.
2. ———: **DISMISSAL OF PROCEEDINGS.** Where, in an appeal from the dismissal of certain condemnation proceedings, it appears that the purpose of the proposed condemnation is to take a part of the land of A against his will as a site for a reservoir from which to irrigate the land of B, the proceedings being brought for B's sole benefit, a judgment of the district court dismissing such proceedings will be upheld.

APPEAL from the district court for Dawes county:
WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

J. E. Porter, for appellant.

E. D. Crites and *F. A. Crites*, *contra*.

LETTON, J.

This is an appeal from a judgment of the district court dismissing certain condemnation proceedings brought by

Vetter v. Broadhurst.

the applicant, Broadhurst, to obtain a reservoir site on the lands of defendants for irrigation purposes.

The petition to the county judge stated, in substance, that applicant was the owner of 160 acres of land, and that defendants owned an adjoining 160-acre tract; that a creek flows through the land of both, and that during the winter season and during freshets in the summer a large amount of unappropriated water of the creek goes to waste; that by its storage and conservation the same can be used in the irrigation of the lands of the applicant; that he had procured a permit from the state board of irrigation to store the flood waters; that the construction of the dam will cause water to cover five acres of land belonging to defendants, and defendants have refused to permit him to use the land for reservoir purposes or to agree as to the amount of damages. Objections were made in the county court by motion and answer, on the ground that the purpose of the applicant was to impound the water for his own private use and not for a public purpose, and for other reasons. The objections were overruled. Appraisers were appointed who viewed the premises and awarded defendants compensation in the sum of \$420. An appeal was taken to the district court, where a motion was made to dismiss the proceedings on the same grounds which was at first overruled, but during the trial leave was given to renew the motion which was then sustained and the proceedings dismissed.

The sections of the statutes under which applicant asserts the right to take defendants' property are section 3444, Rev. St. 1913, which provides in part as follows: "Every person, corporation or association intending to construct and maintain a storage reservoir for irrigation or any other useful purpose, shall make an application to the state board of irrigation, highways and drainage as hereinbefore provided. * * * Upon the approval of such application the applicant shall have the right to impound any and all waters not otherwise appropriated and any appropriated water not needed for immediate use, to con-

struct and maintain necessary ditches for the purpose of conducting water to such storage reservoir and to condemn land for such reservoir and ditches in the same manner as is provided by law for the condemnation of rights of way for other ditches"—and sections 3428, 3430, 3431, Rev. St. 1913, which specify the manner of obtaining rights of way for other ditches.

The principal ground set forth in the motion, and that upon which the district court acted, is that the attempted appropriation and condemnation is not for a public purpose but for a private purpose, being for the sole benefit and advantage of the applicant, and the power of eminent domain cannot be exercised to take defendants' property for private use. Is the proposed taking for a public use? It is pointed out in 10 R. C. L. p. 25, that though some courts hold that "anything which tends to enlarge the resources, increase the industrial energies, and promote the productive power of any considerable number of the inhabitants of a section of the state, or which leads to the growth of towns and the creation of new resources for the employment of capital and labor, contributes to the general welfare and the prosperity of the whole community, and, giving the Constitution a broad and comprehensive interpretation, constitutes a public use," yet other courts have held, and the common law rule and the generally accepted doctrine is, that in order to constitute a public use the property taken must be placed within the control of the public, or of a public agency or instrumentality, and its use or the rates charged for its use be subject to public control, or it must be within the right of the public to use and enjoy. A citation of cases holding to each of these views may be found in 10 R. C. L., notes, p. 22. A full and able discussion of the whole subject may be found beginning on page 24 of the same volume, and in 1 *Wiel, Water Rights* (3d ed.) sec. 606. The proper limits of this opinion lead us to refer the reader to these articles and the authorities cited therein. One of the clearest statements justifying the doctrine that a public advantage or benefit—the gen-

eral welfare, to use another term—may justify the taking of private property against the consent of the owner is given in the opinion by Mr. Justice Peckham in the case of *Clark v. Nash*, 198 U. S. 361, 4 Am. & Eng. Ann. Cas. 1171. In that case it was held by the supreme court of Utah that on account of the peculiarly arid climate of Utah, where agriculture is practically impossible without irrigation, the use of water, even by a private owner, for agricultural purposes was a public use, and was of such value to the commonwealth that a statute permitting condemnation of the right of way for a ditch for the use of a private individual was not unconstitutional. This was upheld by the supreme court of the United States. The opinion, after saying that probably in most states the contention of plaintiff in error would be sound, proceeds: "Where the use is asserted to be public, and the right of the individual to condemn land for the purpose of exercising such use is founded upon or is the result of some peculiar condition of the soil or climate, or other peculiarity of the state, where the right of condemnation is asserted under a state statute, we are always, where it can fairly be done, strongly inclined to hold with the state courts, when they uphold a state statute providing for such condemnation. The validity of such statutes may sometimes depend upon many different facts, the existence of which would make a public use, even by an individual, where, in the absence of such facts, the use would clearly be private. Those facts must be general, notorious, and acknowledged in the state, and the state courts may be assumed to be exceptionally familiar with them." And again: "But we do not desire to be understood by this decision as approving of the broad proposition that private property may be taken in all cases where the taking may promote the public interest and tend to develop the natural resources of the state. We simply say that in this particular case, and upon the facts stated in the findings of the court, and having

Vetter v. Broadhurst.

reference to the conditions already stated, we are of opinion that the use is a public one."

It is practically on the same principle that the Maine, Massachusetts, New Hampshire, and Connecticut mill-dam statutes were held to be constitutional, although there is no doubt that these decisions were largely influenced by the facts that such legislation had been in force in the colonies long before the Revolution, and that the Constitutions of those states must have been adopted in view of the ancient customs and general state policy as shown by former and existing statutes.

Tested by the criteria laid down in the Utah case, is there such a peculiar condition of the soil or climate, or is there any other peculiarity of circumstances in Nebraska, which would justify the taking of the land of one farmer for the benefit of his neighbor. There is a vast difference between the physical configuration and the climatic conditions of the state of Utah, of other states in the arid region of the United States, and of the rocky New England states, and the physical configuration, climate and soil of the state of Nebraska. According to the United States census report of 1910, that part of Utah in which the heaviest rainfall prevails has about the same amount of precipitation as the very driest and most arid portion of the state of Nebraska, viz., 16 inches per annum, while in the driest portion of Utah only about 7 inches of rain falls in a year. The rainfall in Nebraska varies from over 32 inches in the extreme southeastern portion to about 16 inches in the extreme western portion. The general feature of the state is that of a rolling plain, sloping upward from the Missouri river to its western boundary. The elevation above the sea level varies from 842 feet in Richardson county in the southeast to over 5,000 feet in the extreme northwest corner of the state. In the eastern portion of the state the public welfare requires the construction of drainage ditches to carry off the surplus waters, while in the valleys of the extreme western portion irrigation is necessary to agriculture.

Taken as a whole, the state of Nebraska is one of the richest agricultural states in the Union. Its crops are shown by official reports to be of such magnitude that many million dollars worth are exported every year. It is "a land flowing with milk and honey," far surpassing the land shown the messengers from Israel. In 1915 the state produced over 71,000,000 bushels of wheat, over 73,000,000 bushels of oats (Bulletin 33, Nebraska Department of Labor), and over 230,000,000 bushels of corn and other grain. This vast yield was produced upon 15,293,335 acres of cultivated land, of which only 230,848 acres were under irrigation. Bulletin 166, Nebraska Board of Agriculture. The argument from necessity fails in the face of such facts.

But similar questions have already been adjudicated in this state. This court has held that condemnation cannot be availed of to take the property of another for a private road, so as to permit one whose lands are wholly inclosed or surrounded by the lands of others to have access to a public highway. *Welton v. Dickson*, 38 Neb. 767. It has also been held that a statute providing that not less than three owners of wet lands may form a corporation to drain the same, and providing for condemnation of a right of way for a ditch, for such purpose, was unconstitutional, the opinion saying: "Any number of persons, not less than three, being the owners of wet and overflowed lands, whenever it is for their interest, may locate a ditch across the lands of others. There is no requirement in the act that the corporation shall act only in cases where the public welfare would be advanced. And there are no conditions upon which their right to locate a ditch depend, except that they are the owners of wet or overflowed lands. A ditch may be located and opened across the lands of individual owners merely to subserve private interests. Three individuals, by forming a corporation, may locate and open a drain across the property of others without their consent, and compel them to bear the burden of constructing the same. This is an infringement of the right of private property, and is

Vetter v. Broadhurst.

unauthorized and void." *Jenal v. Green Island Draining Co.*, 12 Neb. 163, 167. In *Paxton & Hershey Irrigating Canal & Land Co. v. Farmers & Merchants Irrigation & Land Co.*, 45 Neb. 884, it was declared: "Public use, in a constitutional sense, may be confined to the inhabitants of a restricted locality or neighborhood, but the use must be common, and *not to a particular individual.*"

Furthermore, the statute under which the applicant asserts the right to take his neighbor's land allows condemnation for other purposes than irrigation. If this section is valid, then any one who desires to use water for power to run a private factory, or for any other private use, may condemn the land of his neighbor for a reservoir site and for ditches. In *Traver v. Merrick County*, 14 Neb. 327, the status of water grist-mills in this state was examined, and, upon a consideration of the statute allowing such mills the right to flow the lands of others, it was held that, since the tolls charged by such mills were subject to public control, such mills were works of internal improvement under the statute allowing counties to vote bonds in aid of such works.

In *State v. Adams County*, 15 Neb. 568, it was held that bonds could not be voted in aid of a steam grist-mill, and it was said: "But for the provisions of the statute authorizing the exercise of the power of eminent domain in behalf of water-mills, and thereby placing their regulation under legislative control, they would not be held to be works of internal improvement."

The right of eminent domain is thus held to rest on the right to control of rates by the public. But we are not alone in this view. In *Ryerson v. Brown*, 35 Mich. 333, in an interesting and able opinion by Chief Justice Cooley, the earlier cases in this country, are reviewed, and it is held that a statute permitting the exercise of the right of eminent domain to flow lands of others for water-power purposes for private use is unconstitutional and void.

The operation of a general statute covers the state. The taking of property for the use of another cannot be

Vetter v. Broadhurst.

lawful and proper in the western portion of the state, and unlawful and wrongful in the eastern portion. There is no condition, there is no necessity, there is no prevailing public opinion or sentiment or demand over the greater portion of the state for any such invasion of the right of private property. Even if it should be held that a great and general public advantage may in some cases constitute a public use, we take judicial notice of the fact that neither climatic, agricultural, industrial or social conditions in this state indicate that any such advantage will accrue by permitting such a taking as this statute authorizes.

It may be thought to be rather an artificial distinction to say that an irrigation district, or a canal company created to furnish water to landowners for agricultural purposes for compensation, may exercise the right of eminent domain, but that a private owner of a single tract of land may not have such a privilege. But this difficulty rests on the nature of the matter. Such agencies are in a sense common carriers of water, and the right of control and of regulation of rates exists in the public, so that all courts would agree that such agencies are formed for a public purpose. If a carrier of goods only carries one package of goods, but offers to carry for all, the public is interested, but if he carries for himself alone the public has no concern with his business.

It is not intended by this opinion to declare that the sections of the statutes mentioned are null and void *in toto* as in violation of the Constitution, but only to declare that they cannot, with due regard to the right of private property, be applied to circumstances in which a merely private interest is subserved.

The taking of defendants' property against their will under such proceedings is without due process of law and cannot be justified. The judgment of the district court is therefore

AFFIRMED.

FAWCETT, J., not sitting.

State, ex rel. Diemer, v. Frye.

STATE, EX REL. JOHN DIEMER, APPELLANT, v. THEO. A. FRYE
ET AL., APPELLEES.

FILED NOVEMBER 17, 1916. No. 19496.

Schools and School Districts: ORGANIZATION OF DISTRICTS: AUTHORITY OF COUNTY SUPERINTENDENT. The proviso to the third subdivision of sec. 6703, Rev. St. 1913, is not in conflict with the preceding portion of the subdivision, and confers authority upon the county superintendent of schools in a county in which territory lies which was not then a part of any school district to organize such territory into new districts or to attach the same to adjoining districts without petition or notice.

APPEAL from the district court for Grant county: JAMES R. HANNA, JUDGE. *Affirmed.*

Daniel F. Osgood, for appellant.

A. D. Fetterman, contra.

LETTON, J.

The purpose of this action is to detach from school district No. 3 of Grant county certain territory annexed thereto by the county superintendent of schools in January, 1910. The relator insists that the addition of this territory to the district was made without jurisdiction or authority on the part of the county superintendent, for the reason that no petition was presented to change the boundaries of the district, or to attach any portion of the territory thereto; that no notice of any kind was ever given containing a statement of what changes were proposed in the district boundaries, and of the time and place where the petition would be presented to the county superintendent; that the petitioner is a heavy taxpayer in the district, and that the district board are threatening to spend moneys of the district within the territory so attempted to be attached; that a petition and notice were necessary to authorize the county superintendent to attach unorganized territory to the district. It is admitted

State, ex rel. Diemer, v. Frye.

that no petition praying for the annexation of the disputed territory to the district was presented, and that no notice was given.

The relator relies upon the case of *State v. Compton*, 28 Neb. 485, which holds that a county superintendent of schools has no jurisdiction to detach the property of a part of a school district and attach it to an adjoining district without a petition in writing, and without notice being given of the time and place where a hearing should be had in the matter. At the time the facts in that case arose, section 4, subd. 1, ch. 79, Comp. St. 1887, was in force. The third subdivision of this section provided: "The county superintendent shall not refuse to change the boundary line of any district, or to organize a new district when he shall be asked to do so by a petition from each district affected, signed by two-thirds of all the legal voters in such district." It also required that notice be given of the contents of the petition and when it would be presented to the county superintendent. Afterwards a provision was added that he should not refuse to annex unorganized territory to an existing district on petition signed by two-thirds of the district and of the territory proposed to be attached, and notice of this was required. At the legislative session of 1909 this section was amended by adding the following provision: "Provided that on January 2, 1910, any territory which is not then a part of any school district shall, by the county superintendent of the county in which such territory lies, either be organized into new districts, or attached to one or more adjoining districts." Laws 1909, ch. 117, subd. 3. The relator contends that this proviso does not operate to affect the third subdivision requiring petition and notice, citing the decision in *School District v. Coleman*, 39 Neb. 391, to the effect that a proviso should be considered as referring to that which immediately precedes it only. Conceding this, the proviso in the amendment of 1909 immediately follows that part of the third subdivision of the section which provides that the county superintendent shall not refuse "to

State, ex rel. Diemer, v. Frye.

annex to an existing district any territory not organized into districts when asked to do so by petitions signed by two-thirds of the legal voters of the existing district and the territory proposed to be attached," and providing for a notice. Laws 1909, ch. 117. The proviso affected that portion of the law immediately preceding it.

There is no inconsistency between it and the remainder of the section. The proviso did not become effective until January 2, 1910. The statute went into effect July, 1909. The legislative purpose evidently was to allow about six months during which the residents of unorganized territory might present petitions to the county superintendent either asking the formation of a new district or indicating the district to which they desired to be attached. If at the end of that time they had indicated no preference, the county superintendent was directed to proceed upon his own initiative and either organize the territory into new districts or attach it to one or more of the adjoining districts. This is what was done in Grant county. The statement of facts shows that five similar annexations of unorganized territory to other districts were made and one new district was created upon the same day, thereby placing within organized districts all the previously unorganized territory within the county. The county superintendent being vested with authority to make this annexation, the plaintiff has no cause of action.

The judgment of the district court is

AFFIRMED.

JOHN CASPER V. STATE OF NEBRASKA.

FILED NOVEMBER 17, 1916. No. 19754.

1. Evidence examined, and *held* to support a verdict finding plaintiff in error guilty of larceny from the person.
2. Instructions examined, and *held* sufficient to describe the essential elements of that crime.
3. Criminal Law: TRIAL: INSTRUCTIONS. Where the evidence of the commission of a crime is direct and is supported by corroborative testimony, the defendant is not entitled to an instruction that, if the evidence is reconcilable with innocence upon any reasonable hypothesis, the defendant is entitled to a verdict of acquittal.
4. Larceny: CONVICTION: PROBATION. By the provisions of section 9148, Rev. St. 1913, one who has been convicted of larceny from the person may not be placed under probation by the district court.

ERROR to the district court for Otoe county: JAMES T. BEGLEY, JUDGE. *Reversed, with directions.*

D. W. Livingston, for plaintiff in error.

Willis E. Reed, Attorney General, and *Charles S. Roe*, *contra.*

LETON, J.

The defendant was charged with robbery, and was convicted of larceny from the person under instructions permitting this to be done if no force was used. Sentence was suspended by the court, and defendant placed upon probation.

It is first argued that it is reversible error to submit instructions as to a crime charged, but entirely unsupported by the evidence. There can be no question of the soundness of this proposition. Its applicability here depends on whether the evidence is sufficient to establish the crime of larceny from the person, of which defendant was convicted. In substance, the evidence is as follows: Jacob Pabin, the complaining witness, is a resident of North Da-

Casper v. State.

kota. He formerly lived near Talmage in this state. A few days before Thanksgiving he returned to Talmage upon a visit. Thanksgiving Day he spent with a number of his former intimates. He visited several saloons, where he imbibed to some extent. That night he met John Casper, the defendant, whom he had previously known. Pabin testified that he was at a pool hall that night, and went from there to a garage, where he met defendant about 11 o'clock. He had not arranged for a sleeping place, and he inquired of Casper where one Watham lived, intending to spend the night there. Casper volunteered to show him where Watham lived. As they passed a vacant building Casper asked him to go inside. There was no light in the building, and he therefore refused to enter, when Casper pulled him inside. He fell, and while on the floor Casper reached into his pocket and took from him his pocketbook with a five-dollar bill and \$4.50 in silver in it, and a memorandum book and some papers. After Casper let him up he went back to the pool hall, which was about a block away, where he tried to find an officer. The proprietor of the pool hall testified that Pabin was there about 9 or 10 o'clock, and that night he returned there about half past 11, looking for an officer. The sheriff testified that after Casper was arrested he took him to the building where Pabin said he was robbed to look for papers, and they found none; that afterwards defendant suggested they go back and look again; that Casper then picked up from the floor near some machinery a memorandum book and papers, which were identified by Pabin as having been taken from him. The sheriff also testified that he saw a condition indicating a scuffle upon the floor; that they then went back to the pool hall, where Casper offered to give Pabin the amount of money that had been taken from him, but Pabin refused it, unless he would admit that it was the same money he had taken, which defendant refused to do.

For the defense, defendant testified that it was about 8 o'clock in the evening when he met Pabin in the garage

Casper v. State.

and offered to show him Watham's house; that he went with him a little over a block to a point where they could see a light in the Watham house, and then left him and went home, a distance of about a mile, which he reached about 9 o'clock; that he had not been in the building Pabin described that day. Defendant's mother testified that he came into the house that night between 9 and 10 o'clock. She had gone to bed, and she gave no reasons or criteria for fixing this as the time of his arrival.

Pabin is corroborated by the keeper of the pool hall as to the time he left there to go to the garage where he met Casper, and as to the time that he returned there looking for an officer. Defendant admits he left the garage with Pabin and went near the old building with him. The marks found by the sheriff on the floor and the finding in the building by defendant of the memorandum book and papers taken from Pabin support his evidence that the money was stolen at that place. The jury had a right to consider the actions and appearance of the witnesses upon the stand and to give credence to those whose testimony they believed. They evidently disbelieved defendant. The evidence indicates that Pabin was intoxicated in some degree, but it failed to convince the jury that there was any intent to rob him by putting him in fear or overcoming him by force. There is sufficient evidence to support the verdict finding defendant guilty of larceny from the person.

It is complained that the court failed to instruct as to the essential elements of the crime of larceny from the person. The jury were told, in the words of the statute: "Whoever steals property of any value by taking the same from the person of another without putting said person in fear by threats, or by the use of force and violence, shall be deemed guilty of grand larceny." In another instruction the court said: "The putting in bodily fear with the use of force and violence is not a necessary element in the crime of larceny from the person, but the feloniously carrying away from the person with the intent of converting the property to his own use and against the owner's

consent is necessary." These instructions sufficiently describe the elements of the crime.

Misconduct on the part of the county attorney prejudicial to defendant during the argument is charged. We find no prejudicial error in this respect. One of the objections made by the defendant to the argument was overruled, the other was sustained, and the jury were instructed to disregard any statement made not borne out by the evidence. The first statement was apparently made in response to something said by counsel for defendant.

Since the evidence in this case was direct and was supported by corroborative testimony, the defendant was not entitled to an instruction that, if the evidence is reconcilable with innocence upon any reasonable hypothesis, he is entitled to a verdict of acquittal, as in a case where the evidence is circumstantial only. 2 Thompson, Trials (2d ed.) sec. 2504.

It is urged that the court was without authority to enter the judgment which it did. There is merit in this contention. The court suspended sentence and placed the defendant upon probation. The act of 1913 (Rev. St. 1913, secs. 9145-9151), providing for the appointment of probation officers, the suspension of sentences, and placing the accused on probation, does not apply to persons convicted of certain crimes described in section 9148. Among these is "robbery or larceny of (from) the person." We find no other section of the statute conferring such power upon the district court in such a case. The order made by the court was therefore erroneous. We are reluctant to reverse the order of probation in this case, but feel compelled to obey the statute. The facts justified the order, if the law did not prohibit the exercise of such clemency by the district court in a case of this kind.

Since we find no prejudicial error previous to this order, the judgment of the district court is reversed and the cause remanded, with directions that sentence be pronounced upon the verdict, in accordance with law.

REVERSED.

Maranville Ditch Co. v. Kilpatrick Bros. Co.

MARANVILLE DITCH COMPANY ET AL., APPELLANTS, v. KILPATRICK BROTHERS COMPANY, APPELLEE.

FILED NOVEMBER 17, 1916. No. 18954.

Waters: IRRIGATION: APPROPRIATION: ADVERSE USER. To the extent that a landowner, under a prior appropriation, uses water of a river for irrigation when actually needed, diversions by upper appropriators using water for the same purpose are not adverse.

APPEAL from the district court for Chase county: ERNEST B. PERRY, JUDGE. *Affirmed.*

P. W. Scott, for appellants.

Hazlett & Jack and Charles W. Meeker, contra.

ROSE, J.

Plaintiffs brought this suit in equity in the district court for Chase county to protect alleged priority of rights to the use of waters of the Frenchman river for irrigation. The statutory appropriations of the parties are as follows: Defendant, December 23, 1890, 64.86 cubic feet of water a second; plaintiff Maranville Ditch Company, December 8, 1894, 6 cubic feet of water a second; plaintiff Inman Ditch Company, February 28, 1895, 6.43 cubic feet of water a second. Plaintiffs are upper proprietors. They assert prior rights alleged to have been acquired by prescription or by adverse user for more than the statutory period of ten years. The district court decreed that defendant had a prior right to use 24 cubic feet of water a second. Plaintiffs have appealed.

It is contended that the evidence does not justify the finding below. There is testimony tending to show that by means of two dams, two and five miles, respectively, above defendant's headgate, plaintiffs have for more than ten years diverted to their irrigation ditches the entire flow of the river at those places. Owing to the peculiar nature of the basin of the stream, however, the river, be-

Erickson v. Crosby.

fore reaching defendant's headgate, accumulated considerable water which defendant used for irrigation. Defendant owns 2,000 acres of land under its ditch. One of its officers testified that it annually irrigated from 1,500 to 2,000 acres of its own, in addition to 160 acres which it did not own. To the extent that defendant, under its prior appropriation, used water, when actually needed for irrigation, the diversions of plaintiffs were not adverse. 2 Kinney, Irrigation and Water Rights (2d ed.) sec. 1050; *Faulkner v. Rondoni*, 104 Cal. 140; *Talbott v. Butte City Water Co.*, 29 Mont. 17; *Featherman v. Hennessy*, 42 Mont. 535; *Davis v. Chamberlain*, 51 Or. 304; *Henderson v. Goforth*, 34 S. Dak. 441. Under these circumstances plaintiffs were required to prove that they had deprived defendant of the use of a definite quantity of water to which it was entitled under its prior appropriation. *Hayes v. Silver Creek & Panoche Land & Water Co.*, 136 Cal. 238; *Logan v. Guichard*, 159 Cal. 592. In this situation the trial court found that, while the testimony was not as certain, unequivocal and definite as it should have been, defendant had irrigated annually approximately 1,680 acres, a use of water, according to the statute, equivalent to 24 cubic feet a second. The finding on appeal is the same. This conclusion makes it unnecessary to consider other questions argued.

AFFIRMED.

SEDGWICK and HAMER, JJ., not sitting.

MARY K. ERICKSON, APPELLEE, v. AURELIA CROSBY ET AL,
APPELLANTS.

FILED NOVEMBER 17, 1916. No. 19003.

Adverse Possession. Title may be acquired by adverse possession, though the claim of ownership was invalid and the occupant believed he was asserting legal rights only.

Erickson v. Crosby.

APPEAL from the district court for Franklin county:
HARRY S. DUNGAN, JUDGE. *Affirmed.*

A. H. Byrum and L. H. Blackledge, for appellants.

W. C. Dorsey, contra.

ROSE, J.

This is an action to quiet in plaintiff title to the north half of the northwest quarter of section 25, township 3, range 13 west, in Franklin county. The title was in Ruth Fay Stull, who died September 28, 1898. She had devised the land to her mother. In 1894 the latter adopted plaintiff. The devisee died before testatrix. The will was probated, and it seems to have been assumed by those interested that plaintiff succeeded to the rights of the devisee. Rev. St. 1913, sec. 1314. Desiring to sell the land, plaintiff commenced this suit against David Stevens, a brother of testatrix. After the filing of the petition Stevens died, and his heirs were made defendants. From a decree quieting in plaintiff title acquired by adverse possession, defendants have appealed.

Defendants contend that plaintiff's possession was not adverse or hostile to Stevens. They argue that plaintiff claimed only under the will, a claim based upon a mistaken belief that the adopted child acquired the interest which would have vested in her foster-mother had the latter survived the testatrix. Plaintiff held possession, claiming under the will. *Pettit v. Black*, 13 Neb. 142. If her title was defective, she nevertheless held under a claim of title. *Lantry v. Wolff*, 49 Neb. 374. In the latter case it was said: "It is not essential that the claim of right or title to the land by the adverse occupant be a valid legal claim in order that the statute may run in his favor."

Assuming that plaintiff believed she was asserting legal rights only, and assuming that her claim of title was defective, her possession could nevertheless ripen into title by adverse possession. *Zweiner v. Vest*, 96 Neb. 399;

Erickson v. Crosby.

Daily v. Boudreau, 231 Ill. 228; *Cole v. Parker*, 70 Mo. 372.

In *Andrews v. Hastings*, 85 Neb. 548, it was said: "It is true, as argued by plaintiff, that we have consistently held, since *Horbach v. Miller*, 4 Neb. 31, that occupation of real estate will not ripen into title unless that possession is adverse to the true owner and with the intent and purpose of the occupant of asserting ownership to the land. See *Ryan v. City of Lincoln*, 85 Neb. 539. But possession may be adverse without any declaration of hostility to the true owner. *City of Florence v. White*, 50 Neb. 516. The occupant's intention at the time he took possession is not necessarily a controlling factor. It is sufficient if possession is taken and the premises held for ten years under a claim of right or of ownership. *Fitzgerald v. Brewster*, 31 Neb. 51."

It is further insisted that plaintiff never made an actual entry on the land. The evidence shows that the tenant of testatrix attorned to plaintiff and paid to her the rent. This fact and plaintiff's claim of ownership were known to Stevens. Under these circumstances the possession of the tenant was the possession of plaintiff.

Defendants contend that plaintiff did not by adverse possession acquire title to the entire tract, the evidence showing that the land was unfenced and without improvements, that only 60 acres were cultivated, and that the remainder was hay land. The entire tract was leased and used by the tenant of testatrix, and he attorned to plaintiff. Under these circumstances plaintiff acquired title to the entire tract.

The judgment of the district court is

AFFIRMED.

LEITON, SEDGWICK and HAMER, JJ., not sitting.

JAMES CAMPBELL, APPELLEE, v. UNION PACIFIC RAILROAD
COMPANY ET AL., APPELLANTS.

FILED NOVEMBER 17, 1916. No. 19035.

Railroads: ACCIDENT AT CROSSING: QUESTION FOR JURY. Whether enginemen rung the bell or blew the whistle of a locomotive continuously for 80 rods before crossing a public highway as required by statute is a question for the jury, where witnesses who were in such position and condition that they would probably have heard the signals, if given, testified that they did not hear the whistle or the bell, and other witnesses testified that the whistle was blown and the bell rung. Rev. St. 1913, sec. 6023.

APPEAL from the district court for Buffalo county:
BRUNO O. HOSTETLER, JUDGE. *Affirmed.*

Edson Rich, A. G. Ellick and T. F. Hamer, for appellants.

H. D. Rhea and Edward B. McDermott, contra.

ROSE J.

This is an action in the district court for Buffalo county against the Union Pacific Railroad Company and one of its engineers to recover damages in the sum of \$15,030 for injuries sustained by plaintiff in a collision with a freight train at a public crossing near Odessa. From a judgment in plaintiff's favor for \$5,500, defendants have appealed.

Plaintiff charged defendants with negligence in failing to give the signals required by the following statute:

"A bell of at least thirty pounds weight or a steam whistle shall be placed on each locomotive engine, and shall be rung or whistled at the distance of at least eighty rods from the place where the railroad shall cross any other road or street, and be kept ringing or whistling until it shall have crossed such road or street." Rev. St. 1913, sec. 6023.

Defendants denied the negligence charged, and pleaded that plaintiff was guilty of gross negligence in failing to

Campbell v. Union P. R. Co.

look and listen before going upon the railroad track. At the close of the testimony defendants requested a peremptory instruction in their favor on the grounds that negligence on their part was not proved, and that plaintiff was guilty of contributory negligence which was more than slight in comparison with the negligence imputed to them. The failure to direct a verdict for defendants presents the principal questions for review.

On the morning of December 30, 1913, plaintiff occupied a covered seat on the front end of an oil wagon, while driving a four-mule team westward on a public highway north of and parallel to the Union Pacific railroad in Buffalo county. When 50 feet or more from the railroad, he turned south toward a crossing about 300 feet east of the station at Odessa, where there were three tracks. A west-bound freight train, consisting of a locomotive and eight or ten cars, struck the wheel-mules while they were on the north track. As a result of the collision plaintiff was injured. He testified that before turning south toward the railroad he thought he heard a whistle and stopped; that he looked back through an opening in the curtain of the wagontop, but neither heard nor saw a train; that he drove forward and looked both to the east and to the west; that there was a dense fog which obstructed his vision beyond 450 feet; that when the leaders were on the railroad he saw the engine 150 feet away, but was unable to get the team off the track in time to prevent a collision.

Defendants insist that plaintiff was guilty of gross negligence in failing to look and listen before going upon the railroad, and they argue that his testimony that he did not hear the train approaching shows he did not listen, since, had he exercised ordinary care in doing so, he would have heard the rumble of the train and a highway signal consisting of two long and two short blasts. In this connection reference is made to testimony tending to prove the following facts: At the time of the accident plaintiff wore a cap pulled down to his ears and a duck coat with the collar turned up. The road was rough and the ground

was frozen. Earlier in the morning, when $2\frac{1}{2}$ miles from Odessa, he had heard a freight train 80 rods south of him. At a place a block south of the station the train which collided with plaintiff was heard by witnesses when it was more than a mile away. Two long and two short blasts of the whistle were given about 1,400 feet east of the crossing. The fireman pulled the bell cord and the engineer started the automatic bell. While defendants are correct in asserting that the record contains the proofs thus outlined, there is also candid and substantial testimony tending to show that neither the coat nor the cap worn by plaintiff covered the lobes of his ears. There is no evidence of the length of the train, which he heard at a distance of 80 rods, or of its speed. It is not shown that the situation and conditions which enabled witnesses to hear the approaching train a mile away were substantially the same at the crossing. There is no direct testimony that the bell was rung or that the whistle was blown continuously for 80 rods before the train crossed the highway. Defendants' witnesses did not state that a bell was rung continuously for 80 rods. It is not intimated that the whistle was blown continuously for that distance. The jury were not bound to find that a highway signal was given about 1,400 feet east of the crossing. Disinterested witnesses who were in such situation and condition that they would probably have heard the statutory signals, if given, testified that they did not hear them and that they did not hear a highway signal. Proof that plaintiff stopped before driving on the tracks is corroborated by the engineer. Plaintiff testified that he looked and listened, and that he did not see nor hear the train in time to prevent the collision. It may fairly be inferred from the testimony that the giving of the statutory signals would have prevented the collision. The evidence is sufficient to sustain findings that plaintiff exercised ordinary care before driving onto the track, that he was not guilty of contributory negligence, and that the failure to give the statutory signals was the proximate cause of his injury. *Wallenburg v. Missouri*

P. R. Co., 86 Neb. 642. The law applicable to the evidence may be stated as follows: Whether enginemen rung the bell or blew the whistle of a locomotive continuously for 80 rods before crossing a public highway as required by statute is a question for the jury, where witnesses who were in such position and condition that they would probably have heard the signals, if given, testified that they did not hear the whistle or the bell, and other witnesses testified that the whistle was blown and the bell rung. *United Railways & Electric Co. v. Crain*, 123 Md. 332, 10 N. C. C. A. 571, and note.

The record indicates that the rulings of the trial court are in harmony with the views here expressed, and that there is no prejudicial error in the instructions, though some of them are criticised by defendants.

One of the assignments of error is misconduct of an attorney for plaintiff in making his argument to the jury. The complaint is that he made prejudicial assertions of fact having no support in the evidence. What counsel said was not taken down by the official stenographer, but was reported by affidavit only. The statements ascribed to plaintiff's counsel were assailed by counter-affidavits as inaccurate. Counsel was admonished by the trial court to confine his remarks to the evidence, and the jury were directed to consider proofs only. The presiding judge observed what took place, and its effect upon the jury, if any. He considered the affidavits on both sides of the controversy and overruled this assignment of error in the motion for a new trial. The jury's finding in favor of plaintiff is sustained by competent evidence, and it does not appear that defendants were prejudiced by the misconduct of which they complain, or that there was an erroneous ruling in regard to it.

Complaint is also made of the amount of the recovery, but there does not seem to be a substantial ground for interfering with the award of the jury. Plaintiff was severely shocked and suffered greatly. The evidence is sufficient to sustain a finding that his left arm was per-

Daggett v. Drainage District.

manently stiffened at the elbow as the result of a compound denuded fracture, and that he was otherwise injured. His earning capacity was permanently impaired.

AFFIRMED.

SEDGWICK and HAMER, JJ., not sitting.

ALBERT S. DAGGETT ET AL., APPELLEES, v. DRAINAGE DISTRICT, APPELLANT.

FILED NOVEMBER 17, 1916. No. 18726.

1. **Appeal: HARMLESS ERROR: TESTIMONY OF EXPERTS.** The question of the competency of an expert witness is largely within the discretion of the trial court, and, while an appellate court will correct any prejudicial error arising from abuse of that discretion, a judgment will not be reversed for a technical omission in laying the foundation for expert evidence unless it affirmatively appears that the party complaining has been substantially prejudiced thereby.
2. ———: **REVIEW: OBJECTION TO EVIDENCE.** A general objection to a hypothetical question as to value as "not containing proper elements on which to base an opinion" will not be regarded upon appeal unless it appears that the attention of the trial court was drawn to the omission of some substantial element of value, or that the omission was of such importance that it must have been considered.

APPEAL from the district court for Richardson county:
JOHN B. RAPER, JUDGE. *Affirmed.*

Kelligar & Ferneau and A. R. Keim, for appellant.

C. F. Reavis, contra.

SEDGWICK, J.

The improvement designed and undertaken by the defendant contemplated the construction of artificial channels to straighten the course of the stream of water on which the plaintiff's mill was located. Proceedings were

JOHN HUTTON, APPELLEE, v. MISSOURI PACIFIC RAILWAY
COMPANY, APPELLANT.

FILED NOVEMBER 17, 1916. No. 18835.

1. **Railroads: INJURY TO TRESPASSERS: CONTRIBUTORY NEGLIGENCE.** Where the plaintiff appears from his own testimony to have gone upon the side of the defendant's railroad track, where he lay down upon the ballast with his head about a foot from the rail, with his body alongside of the rail and next to it, and with his hands crossed over his head, and was so lying awake looking at the train as it approached from a distance some 1,500 feet away, he will not be justified in remaining in his dangerous position until the train arrived and he was struck by it and injured, although he testified that he did not hear the noise of the train, or its bell or whistle, and did not get out of the way because he did not hear them.
2. ———: ———: ———. In such case, the cause of the injury would seem to be the plaintiff's wilful negligence in lying down upon the track and neglecting to get up and go away, and for which the railroad company was in no degree liable.
3. ———: ———: ———. The plaintiff was a trespasser upon the defendant's track. When he saw the train coming, he apparently hesitated to make the exertion required to roll off the track, or to get up and walk away. In any event, he would be guilty of contributory negligence, unless it should be shown by a preponderance of the evidence, which it is not, that the defendant's engineer carelessly and negligently ran him down. *Held*, no recovery could be had. *Hooker v. Wabash R. Co.*, 99 Neb. 13.
4. **Negligence: EVIDENCE: PRESUMPTION.** There is no presumption of ordinary care, induced by the instinct of self-preservation, when there is evidence of negligence on plaintiff's part not controverted. *Johnston v. Delano*, ante, p. 192.
5. Evidence examined, and found to be insufficient to sustain the verdict.

APPEAL from the district court for Douglas county:
ALEXANDER C. TROUP, JUDGE. *Reversed*.

B. P. Waggener and J. A. C. Kennedy, for appellant.

Lambert, Shotwell & Shotwell and E. Simon, contra.

Hutton v. Missouri P. R. Co.

HAMER, J.

The defendant appeals from the judgment of the district court for Douglas county. This action was brought to recover damages for an injury suffered by the plaintiff. The plaintiff alleged he was lying on defendant's right of way, and close to the west rail of defendant's railroad track, his head and hands being in close proximity to the rail; that the track was unobstructed, and that he could have been easily seen; that, while the plaintiff was lying on the defendant's railroad track, a freight train came along and ran down upon him without warning, having failed to ring the bell or sound the whistle; that the train ran over the plaintiff and severely injured him, which could have been avoided by the exercise of ordinary care; that the train ran over the right hand of the plaintiff and severely cut and bruised the same so that it was necessary to amputate it at the wrist joint; that from the impact the plaintiff's right and left arms were broken between the shoulder and elbow; that the plaintiff was under the care of a doctor for more than two months, and was totally incapacitated from doing any work for a period of about four months; that said injuries have incapacitated him from doing any kind of work except small jobs like chores, and that the plaintiff has been rendered unable to earn a livelihood for himself, and his earning capacity has been permanently impaired; that prior to the injuries received by the plaintiff he was able to earn from \$25 to \$30 a month as a farm hand, and was 56 years old.

The defendant admitted that the plaintiff received an injury to his right hand, but alleged he was familiar with the dangers and risks necessarily incident to being upon defendant's right of way, and near defendant's railroad track, and that the plaintiff assumed all of the risks and dangers that were incident to his being there upon defendant's right of way at the time that he was injured; that there was no occasion for plaintiff being upon defendant's right of way; that plaintiff was guilty of gross negligence;

Hutton v. Missouri P. R. Co.

and that the defendant railroad company was wholly without negligence.

There was a verdict and judgment against the defendant for \$1,500. Plaintiff contends that the place where he was lying on the defendants railway bed was at a point about 60 feet south of a public crossing; that while he was lying there defendant's servants should have seen him and should have controlled the train which ran down upon him and injured him; that he was lying about 60 or 70 feet south of a crossing, and that the defendant did not ring the bell nor sound the whistle. That the plaintiff had a right to obstruct the defendant's use of its railway track by lying down upon it or against it need not be conceded.

It is first objected by the defendant that the verdict is not sustained by sufficient evidence.

The plaintiff testified to his name, age, and occupation, and to living wherever his hat was off; that he was going from Nebraska City to Auburn; that it was a sunshiny day; that he got on the railroad track at Paul, 6 or 7 miles from Nebraska City; that he found the wagon road was muddy; that he was below Paul and about a mile above Julian; that this was about 60 feet south of the first road crossing north of Julian; that he was tired and lay down to rest on the west side of the track west of the west rail; that his feet were to the northwest and his head about a foot from the track with his hands crossed over his head; that he was lying on the ballast; that he lay down where he did because the rest of the places were wet and muddy; that when he got down to the crossing he lay down about 60 feet south of the crossing; that about 60 feet north of the crossing the track begins to curve; that he was lying next to the rail and on the inside or west side of the curve; that from the crossing he could see up the track for half a mile; that there was a bank on the east side of the track where he was lying, and the track was built up; that there was no bell or whistle; that he did not hear any noise of the train coming; that the cowcatcher struck his right hand and shoulders and broke his hand; that he lost his

little finger and two other fingers next to the forefinger; that the engineer hollered at him; that when he raised up the engine struck him again and knocked him off the side of the track onto the dump; that the tail end of the train was about a quarter of a mile down the track when it stopped; that the train was going about 35 or 40 miles an hour; that they stopped and backed up and took the plaintiff to Julian to a doctor; that it was between 2 and 3 o'clock in the afternoon when he was struck, and was sunshiny; that they took him to Auburn that night to Anderson's hotel, where they got a doctor, who took his hand off at the wrist; that his shoulders and arms were both broken; that the fingers of his left hand are stiff, and he can only raise his arm up a short distance; that he stayed about a week and a half at Auburn, and then went to Nebraska City, where he stayed more than a month; that he was then taken to the poorhouse; that before he was injured he had the full use of both arms and was able to work right along, and got \$2 a day in the rock quarry, and \$35 a month on the farm; that he has not yet done a day's work since he was injured; that before he was injured his fingers were in good condition and his health was all right; that now both his arms pain him and his hand hurts him very much; that he went to the ground with Mr. Simon and Mr. Shotwell, and took the same position on the railroad track that he had when he was injured; that when he was struck by the train he fell over on the side of the road on the dump; that from where he got hurt he could see up the track clear above the whistling post 1,500 feet; that from the whistling post he could see up the track for a mile; that from where he was lying he could see up beyond the whistling post; that there were no trees or anything else close to the track to obscure the view; that he was dressed at that time as he was when he testified, except that he had a black coat on then; that the ballast was white rock; that it was an extra freight, and he could not tell how many cars; that he did not hear any sound of any character before the train

Hutton v. Missouri P. R. Co.

struck him; that there was a wagon road crossing the track near where he was lying.

On cross-examination he testified that he was awake; that his feet were to the northwest and his head to the southeast; that the train came from the north; that he could see it for 1,500 feet; that the reason he did not get up out of the way was that he did not hear it; that they did not make any whistling or noise, and there was no bell; that he did not hear the train or the bell or whistle; that there was nothing to obstruct his view for 1,500 feet to the north; that in the direction from which the train came the engineer and fireman could not help seeing him; that he could see the engine for 1,500 feet, and that he was awake. The fact that the plaintiff testified that he saw the train coming when it was 1,500 feet away, and that he remained lying along side of the rail until the engine reached him makes this a case for careful consideration.

He further testified that when he went onto the track at Paul he had not bought a ticket, and did not say anything to the agent, and the agent did not say anything to him; that he went onto the right of way without the permission of the railroad company, although he knew that the trains ran there during the daytime; that he saw the curve of the track start about 60 or 70 feet north of the wagon road; that the cattle guards were between him and the engine coming from the north; that the ground slopes from the end of the ties down toward the ditch; that exhibit 1 is a fairly correct picture of the cattle guards that were north of him when he got hurt; that he was south from the south cattle guard; that when the engine came along and hit him it knocked him a little way, and then came along and hit him again and rolled him over on the side of the dump; that when it first hit him it knocked him about 8 or 9 feet; that he was lying about 60 feet south of the south cattle guard; that the road was muddy; that he could see after it knocked him off that the train went between a quarter and half a mile before

Hutton v. Missouri P. R. Co.

it stopped; that it was a bright, clear day; that he had a cane or a stick, and it was resting on the west rail, and his head and hands were on the stick; that he intended to get out of the way *before the train came*.

Miss Vera L. Wilson testified that she went out with Mr. Shotwell, Mr. Simon, Mr. Hutton, and Mr. Taylor, her brother-in-law; she went to examine the ground and the track; that it was a clear, sunshiny day about 2 o'clock in the afternoon; that the general direction of the road at that point was north and south; that there was a little bend in the track north of the crossing; that Mr. Simon, Mr. Shotwell, Mr. Taylor, and the witness went up as far north as the whistling post; that when they were at the whistling post Mr. Hutton was lying in the position he says he was in when the train hit him; that he was just south of the crossing on the west side of the track, which would be on the inside of the curve; that he was in that position when the witness and the others were up at the whistling post; that when she was up there she looked down the track to where Mr. Hutton was then lying; that she could see an object on the track, but could not say whether it was a man or not; that when she got to the crossing she looked up and could see clear up to a point which she imagined was over a mile beyond the whistling post; that she stood where Mr. Hutton was lying and could see clear to the curve, beyond the whistling post; that there was a curve north of the whistling post a mile or a mile and a half; that there was a curve to the south of the whistling post; that if she had been lying where Mr. Hutton said he was lying, the wings of the cattle guard would be between her and the engine; that Hutton was lying on the track south of the cattle guards right close to the track and next to the ties; that the railroad was ballasted with gravel or cinders.

Dr. S. J. Grudupe testified that he was a practicing physician living at Julian, Nebraska; that he was called to the depot about a year ago and saw the plaintiff; that

Hutton v. Missouri P. R. Co.

he looked the man over and saw no effects of alcohol; that he seemed shocked and dazed.

On being recalled the plaintiff testified that the night before he was injured he stayed at the depot at Nebraska City, and did not have anything to drink on the day of the injury.

Edward Simon testified that he lived in Omaha and was a practicing lawyer; that, after the accident, Mr. Shotwell, Miss Wilson, Mr. Taylor, and Mr. Hutton went with the witness to investigate the place where Hutton was hurt; that they went to the road crossing near where Hutton was hurt, and got there about 2:30 p. m.; that they had Mr. Hutton take the position he was in at the time he was hurt; that from the whistling post the witness looked down to the place where Hutton was then lying; that he could see an object lying there, but could not distinguish what it was; that he then measured the distance from the whistling post to the crossing by stepping it, and found it to be about 500 paces of 3 feet each; that the general direction was north and south; that from where Hutton lay you could see the track for about a mile; that there was another crossing about half a mile from the crossing where they stood; that there was nothing to obstruct the view from the whistling post; that Hutton was on the inside of the curve, which was on the right going south; that the photograph, exhibit 1, truly represents the cattle guards. The plaintiff offered in evidence exhibit 1, which shows the track at the cattle guard. Simon further testified that the middle of the curve would be about half way between the whistling post and the cross road; that when the witness made his observation he knew that Mr. Hutton was lying on the track.

When the witness had finished introducing his evidence counsel for the defendant moved the court for a directed verdict for the defendant. This motion was overruled. The grounds of the motion were that the evidence failed to show any negligence on the part of the defendant; that the plaintiff was a trespasser on the defendant's right

Hutton v. Missouri P. R. Co.

of way; that the evidence failed to show any knowledge on the part of the defendant company of the presence of the plaintiff on its right of way; that the evidence showed the plaintiff was fully familiar with the fact that he was lying down on the right of way of defendant company's railway, and that if he did not remove himself from the position he would be hurt; that the evidence showed that the plaintiff assumed the risk of being on the defendant company's right of way and in close proximity to defendant company's railroad track.

On behalf of the defendant, C. M. Hysell testified that he was the engineer operating the train; that he was about 200 feet from Hutton when he first saw him; that the instant he saw him he put on the emergency to get the air on the emergency brake and make a good stop; that the train was about 1,200 to 1,300 feet in making the stop; that there were 38 freight cars, an engine, and a caboose on the train; that the tonnage back of the engine was 10,000 tons; that the train was running south on a down grade at about 30 miles an hour; that the witness was sitting on his seat in the engine in the ordinary lookout to see that there was nothing on the track, any obstruction or anything; that Hutton was lying right next to the cattle guard on the right-hand side of the track; that he was on the inside or west side of the curve and close to the cattle guard; that his head was toward the cattle guard, his shoulders upon the ties, and his feet hanging down over the ballast; that there was one cattle guard south of the roadway and one on the east side; that there are crossbars on each side of the tracks in connection with the cattle guards; that outside of the cattle guards there is a fence and post and the wing of the fences; that exhibit 1 is a fair reproduction of the curve of the track; that from the whistling post to the crossing is about 1,300 feet; that the whistling posts along the Missouri Pacific Railway are located a quarter of a mile from the crossing, which would be 1,320 feet.

Hutton v. Missouri P. R. Co.

On cross-examination this witness testified that the crossing in question is about one mile north of Julian; that there is another crossing a half a mile north of that; that whistle signals were given as the train approached the crossing; that there were two long and two short whistles; that they were given at the whistling post a quarter of a mile north of the roadway; that the whistle was the only signal given; that the emergency air brake was working, and the witness slapped it on immediately; that the train was then about 200 feet north of the road; that the day was cloudy; that the eyesight of the witness was good at that time; that the distance he can see ahead depends upon where he is; that his position was on the right-hand side of the engine; that this was 100-class engine, engine 30; that from where the witness sat in the engine to the ground was about 8 feet; that immediately in front of the witness was an opening so that he could look straight ahead, and that there was nothing to obstruct his view; that he could see the track from that crossing down to the other crossing; that he was looking down the track, but did not see Hutton; that he could stop the train in about 1,200 to 1,300 feet.

On redirect examination the witness testified that the train could not have been stopped on that grade going at 30 miles an hour with 10,000 tons back of the engine in a distance of 800 feet; that the cattle guard interposed between the vision of the witness and where Hutton was lying, and that he could not have seen him earlier than he did; that this was because there were two cattle guards, one on each side of the roadway; that Hutton was lying by the south cattle guard, and to the south of the roadway; that the north cattle guard prevented the witness from seeing him until he got within 200 feet of him.

F. B. Dejarnette testified that he was the conductor in charge of the train that struck Hutton; that he went back to where Hutton was lying; that Hutton was then about 10 or 15 feet south of the line of fence, and about 10 or 15 feet from the main line of the track, lying south

Hutton v. Missouri P. R. Co.

and west from the cattle guards; that the tonnage of the train was 10,000 tons; that the engine operated the very best it could operate.

C. H. Bresler testified on behalf of the defendant that he was one of the brakemen on the train that hit Mr. Hutton; that he noticed the train coming to a quick stop; that the air and brakes worked well and stopped the train immediately; that the witness did not think that the train could be stopped within less than about 800 feet.

W. A. Loomis testified that he was the fireman of the train; that he observed the air brake and it worked well; that he did not think that a train with 10,000 tons back of the engine on that grade could have been stopped in a shorter space than approximately 1,300 feet.

C. M. Hysell was recalled for further cross-examination, and testified that he could not see the cattle guards at the crossing where Hutton was injured.

At the conclusion of the evidence the defendant renewed its motion for a directed verdict. The motion was overruled.

The only duty of a railroad company to a trespasser who enters upon its right of way without its knowledge or consent, not within a highway crossing, and uses its road bed and track as a sleeping place, is not wantonly, wilfully, or carelessly and negligently to injure him.

In *Hooker v. Wabash R. Co.*, 99 Neb. 13, it was said in the body of the opinion: "The rule of law is that, where a man walking upon the track is a trespasser, and is negligent in failing to keep a lookout for approaching trains up to the time of the accident, and there is nothing to prevent him from getting out of the place of danger by stepping off of the railroad track, the defendant company is not liable, unless its engineer is guilty of a want of reasonable care under all the circumstances." We think this view is sustained by *Shults v. Chicago, B. & Q. R. Co.*, 83 Neb. 272.

In *Langenfeld v. Union P. R. Co.*, 85 Neb. 527, where the plaintiff, who was walking in the yard of the defendant

company, and was a helper in a necessary part of its business, and therefore was rightfully walking in the path between two main tracks, met a train coming on one of the tracks, and, with a view of avoiding danger, stepped over to the other track on which there was a standing train of box cars, and put his shoulder in between the ends of two of the cars, and immediately the standing train was moved by a switch engine, and the ends of the cars, coming together because the bumpers were gone and the cars were fastened together with chains, pinched plaintiff's shoulder and injured the same, it was declared by this court that there was no liability of the defendant because the plaintiff had space in which he could have continued to walk (5 feet), and he could have crossed the track on which the train was coming in, and ahead of the train, and could so have avoided danger, and the defendant company was under no obligation to keep the bumpers on the box cars in anticipation that the plaintiff would attempt to use the cars as he did. This court then laid down the doctrine, as stated in the syllabus: "In order to constitute actionable negligence, there must exist three essential elements, namely, a duty or obligation which the defendant is under to protect the plaintiff from injury; a failure to discharge that duty; and injury resulting from the failure." It was also said: "When plaintiff stepped out of the beaten way between the cars, the only duty owing to him by the defendant was to exercise proper and reasonable care not to injure him, as soon as it acquired knowledge of his dangerous position." The defendant had no knowledge of his danger and no reason to anticipate that a stranger to the operation of the train would, while the cars were in its private yards, place himself in such a position.

This view is in entire harmony with the principle laid down in *Chicago, B. & Q. R. Co. v. Wymore*, 40 Neb. 645: "A railroad company does not discharge its whole duty by refraining from wantonly injuring a trespasser upon its tracks after observing his position. It is bound

Hutton v. Missouri P. R. Co.

in all cases to exercise reasonable care to avoid injuring all persons who are known to be, or who may be reasonably expected to be, upon its right of way." The opinion is sustained by *Chicago, B. & Q. R. Co. v. Wilgus*, 40 Neb. 660, and other cases cited.

The engineer of the train testified that the train ran at the rate of 30 miles an hour. We are unable to say that the evidence shows that the speed of the train was excessive. The engineer fixes his distance from the plaintiff at the time he first saw him at about 200 feet. No one disputes the testimony of the engineer concerning the distance that the train was from the plaintiff when the engineer first saw him. The moment the engineer saw the plaintiff he applied the emergency brakes. He did what he could to stop the train within the shortest period of time and in the least space. The plaintiff's witnesses, when they were as far away as the whistling post, 500 paces, could not distinguish that Hutton, then lying at the place where he claims to have been injured, was a human being. As they went from the point toward the crossing they had to proceed to a point about 800 feet from Mr. Hutton, to be able to make out that the object in sight was a human being, although then knowing that Hutton was then lying there. If witnesses on the ground were unable to ascertain that Hutton then lying on the ground was really a human being, there could have been no duty upon the part of the engineer to perform an impossible task. The train that was coming up to Hutton was a long freight train. It had lots of rumble and roar. It made a noise that could be heard for a long distance, but Hutton was lying still on the ground. According to his conduct, he was unwilling to be disturbed. There does not appear to be any virtue which in any way tends to lead to the conclusion that greater care upon the part of the engineer would have saved the plaintiff from injury. We are unable to conceive of a man with ordinary intelligence and ordinary sobriety lying down and inviting the train to

come and run over him. No one could have acted in a more lawless manner than he.

There is no evidence that the engineer saw the plaintiff in time to have stopped the train before the plaintiff was reached. The jurors found a verdict for the plaintiff. It was clearly within their right to do this if there had been any evidence upon which to base their verdict, but all the evidence tends to show that the plaintiff was so sheltered behind the wings of the cattle guards as to be invisible to the engineer until he was within 200 feet of him. He was therefore justifiable in running the train as he did. The plaintiff was not helpless. He was in duty bound to look for any train that might come along. It was his duty to look so that he might protect himself from the train that was coming. He testified that he did look and that he saw the train. The engineer testified that he was keeping a lookout, but that he did not see the plaintiff until he was within 200 feet of him, and that that was too close to enable him to stop his train. To let the plaintiff recover is to let him do so in spite of his negligence and in spite of his refusal and neglect to get up or to roll over out of the way.

The duties of the plaintiff and the engineer were, to a certain extent, reciprocal, but to let the verdict stand puts all the burden upon the defendant and requires the engineer to accomplish an impossible feat. He could not see through the wings of the cattle guards, and there is no good reason why he should have been expected to do so.

On cross-examination the plaintiff admitted that he was lying on the track when he saw the train coming at a distance of about 1,500 feet. Apparently he hesitated to make the exertion required to roll off the track, or to get up and walk away, as he might readily have done. Unless the defendant's engineer carelessly ran the plaintiff down, of which there is no evidence, no recovery should be had. It cannot be said that the defendant's engineer had an opportunity for actual knowledge concerning the position of the plaintiff and his condition. The case is one where

Hutton v. Missouri P. R. Co.

the plaintiff enters upon the defendant's close and lies down upon its track because it suits him to do so, and then he sees the train coming and refuses to get up or to roll out of the way, and yet insists that the railroad company shall bear the burden of his self-imposed injury.

We refer to the following additional authorities: *Chesley v. Rocheford & Gould*, 4 Neb. (Unof.) 768; *Burtis v. New York C. & H. R. R. Co.*, 143 N. Y. Supp. 145; *Newell v. Detroit, G. H. & M. R. Co.*, 187 Mich. 697.

In *Krummack v. Missouri P. R. Co.*, 98 Neb. 773, this court held: "Where the evidence shows that the switching-yards of a railway are close to a large public school building and playground, that young children have long been in the habit of playing on or near the cars and tracks, ordinary care demands that in switching cars due regard should be paid to these conditions, and a failure to inclose the tracks and a neglect on the part of those engaged in switching to observe whether children are on the cars or tracks when a train is being backed in, from the lack of which precautions a trespassing child is injured, may constitute actionable negligence." It will be noted that this is one of those cases where the supposed trespasser has not arrived at years of discretion. Besides, in this case the injured man was behind the wing of the cattle guard, and therefore could not have been seen. The doctrine laid down in this case cannot well be held to apply to the instant case, because young children are not trespassers of mature age, and they should not be held responsible during their immaturity and lack of judgment.

The motion of the defendant for a directed verdict should have been sustained, because the evidence is insufficient to sustain the plaintiff's case. The judgment of the district court is reversed and the case remanded.

REVERSED.

SEDGWICK, J., not sitting.

ROSE, J. I concur in the conclusion.

State Bank v. Huffman.

LETTON, J. The Plaintiff, a man of full age and apparently of sound mind, was a trespasser upon the right of way. He lay down to rest, close to the railroad track, was struck by a train and severely injured. He testifies that he did not see nor hear the train coming, but admits he may have been in a doze when he was struck. The train was running at the usual and ordinary rate of speed.

Under the admitted facts, he was guilty of the grossest negligence. The burden is upon him to establish that the engineer in the exercise of his duty to keep a lookout on the track could have seen him in time to avoid striking him. Unless this has been proved, there is no cause of action. The evidence does not establish this fact, and there can be no recovery. I concur in the conclusion.

STATE BANK OF OMAHA ET AL., APPELLEES, v. WILLIAM L. HUFFMAN, APPELLANT.

FILED NOVEMBER 17, 1916. No. 18895.

1. **Evidence examined, and found to support the findings and judgment of the district court.**
2. **Bills and Notes: ACTION: DEFENSES.** A controversy between two joint indorsers of a note as to whether one of them is an accommodation indorser for the benefit of the other may not be interposed as a defense as to the holder and owner of the note, who will be entitled to a judgment against both indorsers in an action against them.
3. **Appeal: CONFLICTING EVIDENCE.** Where, in an action brought by the State Bank of Omaha against Walter Moise and William L. Huffman, who signed as indorsers a note given by the Omaha Motor Car Company to said bank for the sum of \$5,000, there was a contention between Moise and Huffman as to whether Moise was primarily liable to the plaintiff on the note set forth in the petition, and there was conflicting evidence tending to establish the claim of each defendant touching the matter in controversy, the finding of the court in favor of one of the defendants and against the other will not be disturbed.

State Bank v. Huffman.

4. ———: ———. Where, in an action at law, the case is submitted to the trial court upon conflicting evidence concerning whether one of two indorsers indorsed the note as an accommodation to the other indorser, and there is sufficient evidence to sustain the finding of the court in favor of one of the indorsers and against the other, this court will not reverse the judgment, even if there was sufficient evidence to have sustained a finding in favor of the opposite party. *Waters v. Hardt*, 87 Neb. 636.
5. ———: TRIAL TO COURT: FINDINGS. In an action at law tried to the judge of the district court, his findings and judgment are entitled to the same weight and consideration as is the verdict of a jury. *National Bank v. Cooper*, 86 Neb. 792.
6. **Bills and Notes: ACCOMMODATION MAKER.** "An accommodation maker is one who executes commercial paper without consideration in order to enable the payee, or holder, to thereby obtain credit." *Peoria Mfg. Co. v. Huff*, 45 Neb. 7.

APPEAL from the district court for Douglas county:
GEORGE A. DAY, JUDGE. *Affirmed.*

Byron G. Burbank, for appellant.

Brown, Baxter & Van Dusen, W. J. Connell and Ellery H. Westerfield, *contra.*

HAMER, J.

This is an action by the State Bank of Omaha against Walter Moise and William L. Huffman. The petition alleged that on the 6th day of June, 1913, the Omaha Motor Car Company, a corporation under the laws of Nebraska, for a valuable consideration made and delivered to the plaintiff, the State Bank of Omaha, its promissory note as follows:

"Omaha, June 6, 1913. No. 572. Due Dec. 6, \$5,000. Six months after date we or either of us promise to pay to the State Bank of Omaha or order five thousand and no/100 dollars, value received, at the State Bank of Omaha, Nebr., with interest at the rate of 6 per cent. per annum from maturity until due, payable annually. If this note is not paid at maturity, principal and interest shall draw

State Bank v. Huffman.

interest at the rate of 10 per cent. per annum from maturity until paid.

Omaha Motor Car Co.,

"By W. L. Huffman, Sec. and Treas."

The petition further set forth that the names W. L. Huffman and Walter Moise were indorsed on the back of said note; that prior to the delivery of said note, and as a part of the consideration for the loan of \$5,000 as alleged therein, the defendants, W. L. Huffman and Walter Moise, indorsed their names upon the said note as joint makers; that said note was duly presented for payment at maturity, but was not paid, and thereafter was duly protested for nonpayment, and notice was duly served as provided by law upon said W. L. Huffman and Walter Moise, informing them of the dishonor of the said note, and that they would be held for payment of the same; that the costs of said protest and notice was the sum of \$2.59; that no part of the said note or interest or protest fees has been paid, and that there is due and owing from the defendants to the plaintiff the sum of \$5,002.59, with interest thereon at the rate of 6 per cent. per annum from the 6th day of December, 1913. The plaintiff prays for judgment against the defendants, W. L. Huffman and Walter Moise, in the sum stated, with interest and for the costs. The Omaha Motor Car Company, whose name appears on the note as the maker, was not sued.

By answer and cross-petition, William L. Huffman submitted to the court a controversy with his codefendant and comaker of the note, Walter Moise, as to which one of the two was primarily liable on the note. It is contended by the bank that it had no notice of a controversy between Huffman and Moise. A jury was waived, and the district court held both defendants, Huffman and Moise, to be primarily and severally liable on the note and entered judgment against them. It is contended by the bank that neither defendant claimed at the trial that the bank had agreed to look to either defendant more than to the other for the payment of the note. It is claimed on behalf of the bank that it was entitled to a joint and several judg-

State Bank v. Huffman.

ment against both defendants, and that, if there exists a valid contract between Moise and Huffman wherein only one was security for the other on the note, then that contract is enforceable in a separate suit brought for that purpose, but that it cannot be enforced in this suit by having a judgment entered other than that which a joint contract between them and the bank would justify. This court is asked to reach a different conclusion from that reached in the trial court.

Huffman contends, as appellant, that the judgment is not sustained by the evidence, and that it is against the clear weight of the evidence, and that it should have been in favor of the appellant, William L. Huffman, and against Walter Moise, the appellee. It is contended by Huffman that the judgment should have found Walter Moise primarily liable to the plaintiff on the note set forth in the petition, and should have directed execution to issue first against him before any liability could be enforced against appellant. It was claimed that the court erred in not finding that the appellant was an accommodation indorser on the note set forth in the petition, and at the request of Walter Moise, the appellee.

The defendant Huffman filed a long answer and cross-petition in which he set up that the defendant Walter Moise entered into a contract with D. W. Henry, himself, W. A. Gordon, and the Omaha Motor Car Company to loan the company \$15,000, the same to be secured by a bill of sale covering certain furniture and fixtures owned by the corporation, and all material, machinery, fixtures, and other personal property owned by said company, including two automobiles. There was a recital in the agreement that all of the parties were stockholders in the Omaha Motor Car Company, which was engaged in the manufacture of automobiles; that pursuant to the agreement a certain bill of sale was executed by the Motor Car Company, and delivered to the defendant Walter Moise, and which was for his security; that on June 7, 1912, Moise took a note signed by the Motor Car Company for the sum

State Bank v. Huffman.

of \$5,000, due December 6, 1912, to the Merchants National Bank of Omaha, and indorsed the same; that said Moise caused \$5,000 to be paid by the Merchants National Bank to the Omaha Motor Car Company; that the \$5,000 note became due, and that to obtain money to pay the same said Walter Moise obtained the note of the said Omaha Motor Car Company for \$7,000, and indorsed the same; that the defendant Huffman also indorsed the same; that the sum of \$7,000 was obtained from the State Bank of Omaha, and that there was paid to the said State Bank of Omaha the sum of \$2,000 of the said \$7,000; that said Moise agreed to pay said note when it became due, but failed to do so, and that \$5,000 thereof was renewed by a new note, while \$2,000 was paid on the said sum of \$7,000; that said notes made by the Omaha Motor Car Company were placed in the hands of the said Walter Moise to enable him to carry out his agreement of furnishing \$15,000 for the use of the company; that the defendant Huffman indorsed said notes for the purpose of enabling the said Walter Moise to obtain said money, and that what Huffman did was done for the accommodation of Moise and without other consideration; that Moise was to pay the notes and save the defendant Huffman from all liability. Judgment was asked by Huffman to the effect that as between the defendant Huffman and Walter Moise the court should find that Moise was first liable for the payment of said note and interest, and that execution should first issue upon said judgment against said Moise, and that said judgment should be collected from him, the said Moise.

Moise answered the cross-petition of Huffman setting forth that the bill of sale was made to protect him, said Moise, from loss or damage by reason of advances of money to said Omaha Motor Car Company, and to protect him, said Moise, from any liability which he might incur by signing or indorsing notes on behalf of the said Motor Car Company; that said Moise admitted that the note signed by the Omaha Motor Car Company for the sum of \$5,000, due Dec. 6, 1912, to the Merchants National Bank of

State Bank v. Huffman.

Omaha was indorsed by him, said Moise and also by D. W. Henry and the defendant W. L. Huffman, but there was a denial that Huffman signed for the accommodation of the defendant Moise, or to enable the defendant Moise to perform his alleged agreement of obtaining the said \$15,000; and it was alleged that the said Huffman signed the same by reason of his direct interest in the said Omaha Motor Car Company, and to enable it to continue business; that the said Omaha Motor Car Company made another note for \$7,000, which was indorsed by all of the said parties the same as the said note for \$5,000 and for the same purpose, and that \$5,000 out of the said \$7,000 was used to pay the \$5,000 note due at the Merchants National Bank, and that the additional \$2,000 of the \$7,000 note was paid to the said Omaha Motor Car Company to enable said company to meet certain alleged expenditures of the company and to enable it to continue in business; and Moise denied that he agreed to pay said note when it became due; that there was a denial that the note was indorsed by the defendant Huffman at the request of the defendant Moise, or for his benefit. It was also alleged that when the \$7,000 note became due the sum of \$2,000 was paid thereon, one-half by the defendant Moise out of his own money, and one-half by the defendant Huffman out of his own money, and that the remaining sum of \$5,000 was renewed by a new note; that each of the defendants were bound and required to pay one-half of the said \$5,000 note.

The district court found for the bank as against the defendants Huffman and Moise, but found for Moise as between Moise and Huffman.

"Where, in an action at law, the cause is submitted to the trial court upon conflicting evidence, and there is sufficient to sustain the finding of the court hearing the cause, this court will not reverse the judgment, even if there was sufficient evidence to have sustained a finding in favor of the opposite party." *Waters v. Hardt*, 87 Neb. 636.

State Bank v. Huffman.

"A finding of fact made by a jury upon conflicting evidence will not be disturbed unless manifestly wrong." *Stevenson v. Omaha Transfer Co.*, 87 Neb. 794.

"A fact determined by a jury upon conflicting evidence is conclusive on appeal, unless the finding is manifestly wrong." *First Nat. Bank v. Golder*, 89 Neb. 377. In the body of the opinion it was said: "The judgment is also assailed as erroneous because the evidence, from the standpoint of defendant, establishes the fact that he signed the note for the accommodation of plaintiff at the request of plaintiff's cashier, relying upon the latter's statement that Golder, the maker, was solvent, and upon an agreement that he assumed no liability. Defendant adduced testimony tending to establish this defense, but the material proof in support of it is directly contradicted by plaintiff's cashier."

"A verdict upon conflicting evidence will not be set aside, where there is sufficient evidence to support it." *Wenninger v. Lincoln Traction Co.*, 84 Neb. 385. In the body of the opinion it is said: "Had the jury found a verdict in favor of the defendant, the evidence would have sustained it, but we cannot grant a new trial for that reason, since there is sufficient evidence, if believed, to support this verdict."

"This court will not weigh conflicting evidence." *Fischer v. Kram*, 63 Neb. 241. In the body of the opinion it is said: "The evidence in the record is quite conflicting. That adduced by the defendant fully sustains his contention, while the evidence on behalf of plaintiff is ample to sustain the finding of the jury."

"An accommodation maker is one who executes commercial paper without consideration in order to enable the payee, or holder, to thereby obtain credit." *Peoria Mfg. Co. v. Huff*, 45 Neb. 7. In the body of the opinion it is said: "The facts, as testified to by the defendant, bring the transaction clearly within the foregoing definition, and it was the province of the jury to determine the question of his credibility as a witness, and their finding,

Horn v. Abbott.

bearing as it does the approval of the trial judge, should not be disturbed in this proceeding."

"In an action at law tried to the judge of the district court, his findings and judgment are entitled to the same weight and consideration as is the verdict of a jury." *National Bank v. Cooper*, 86 Neb. 792.

In a law case, where the evidence is conflicting, the judgment will not be set aside by a reviewing court unless it is clearly wrong.

While we are perhaps not bound to follow the findings and judgment of the district court, we have not been shown any good reason for disregarding the same. The trial judge appears to have been careful in his rulings and in his consideration of the case. There is plenty of evidence to sustain his judgment.

The judgment of the district court is

AFFIRMED.

LETTON and SEDGWICK, JJ., not sitting.

WILLIAM HORN, APPELLANT, v. LYSLE I. ABBOTT, APPELLEE.

FILED NOVEMBER 17, 1916. No. 18952.

1. Evidence examined, and found to sustain the finding and judgment of the district court as to the appellee, Lysle I. Abbott.
2. **Corporations: SALE OF BONDS: FRAUD.** Where a suit in equity was brought against certain defendants in the district court for Douglas county alleging misrepresentations as to the value of certain bonds in a corporation, and the evidence showed that these defendants were all stockholders, directors and officers of the corporation, and that the representations were made to induce the purchase by the plaintiff of said bonds of the corporation owned by one of these defendants, and that the sale was made by the owner of said bonds and the bonds delivered, but there was no evidence that the appellee had made any representations to the plaintiff concerning the

Horn v. Abbott.

value of the property of the corporation or the value of the bonds, and he had no interest in the sale, he will not be held liable, although he had been elected president of the company; there being no showing that he was in any way derelict in his duty.

APPEAL from the district court for Douglas county:
ABRAHAM L. SUTTON, JUDGE. *Affirmed.*

Carroll J. Lord, for appellant.

I. J. Dunn and Ray J. Abbott, contra.

HAMER, J.

Appeal from the judgment of the district court for Douglas county against the plaintiff, William Horn, and in favor of Lysle I. Abbott, in a suit in equity in which said William Horn was plaintiff and Lysle I. Abbott, Fritz Jaeggi, Arnold Koenig and the Niobrara Investment Company were defendants. There was a judgment in favor of the plaintiff, William Horn, and against Fritz Jaeggi, Arnold Koenig and the Niobrara Investment Company.

The defendants, Jaeggi, Koenig and the Niobrara Investment Company did not appeal. The plaintiff in his petition alleged that Lysle I. Abbott, Fritz Jaeggi and Arnold Koenig were the directors and officers of the Niobrara Investment Company, of which Lysle I. Abbott was then alleged to be president, and Arnold Koenig vice-president, Fritz Jaeggi secretary and treasurer. It was also alleged in said petition that the said Niobrara Investment Company was a corporation; that on the 20th day of January, 1911, the said plaintiff, William Horn, was induced to purchase five \$1,000 first mortgage gold coupon bonds of the Niobrara Investment Company from the said corporation; that the said plaintiff relied upon the general representation of the officers and directors of said corporation, and the printed statements contained in a prospectus issued and circulated by said corporation, and which it is contended undertook to state that the said bonds were amply secured by a first mortgage upon several thousand acres of the finest Nebraska farm land

Horn v. Abbott

owned by said company at that time; that, as a matter of fact, the corporation did not own any farm land in the manner represented by the directors of said corporation and as contained in its printed prospectus; that, as a consideration for the purchase of said bonds, said plaintiff paid to the corporation aforesaid in cash \$1,000, and entered into a written contract to convey to said corporation by a good and sufficient deed a quarter section of land situated in Kimball county, Nebraska, and then belonging to the plaintiff; and that the said bonds, when said contract was entered into and at the time of bringing said suit, were without value of any kind. The plaintiff prayed that the entire contract between himself and the Niobrara Investment Company should be rescinded; that the contract for the transfer of the land in Kimball county to the corporation be set aside and held to be null and void; and that the plaintiff recover judgment against each of the defendants for the sum of \$1,000, paid to said corporation, together with interest thereon from the date of payment.

The defendants Lysle I. Abbott, Fritz Jaeggi, Arnold Koenig and the Niobrara Investment Company each filed separate answers, admitting the existence of said corporation, the names of those composing its board of directors, and the officers of said corporation, and that a contract was entered into between the plaintiff, William Horn, and the corporation, the Niobrara Investment Company. There was an admission of the issuance of a prospectus by the said Niobrara Investment Company. The answer of the defendants denied that the plaintiff, in the purchase of the bonds, relied upon the statements contained in the prospectus, and each defendant separately alleged that the plaintiff made the purchase on his own independent inquiry and judgment.

The plaintiff filed a reply to each of these answers, in which he alleged that he purchased the bonds relying solely upon the statement contained in the prospectus issued by the corporation, the Niobrara Investment Company, and

upon the representations made by the directors and officers of such corporation as to the assets of the said company.

On the trial, the court entered up a decree finding that the plaintiff was entitled generally to relief as prayed for in his petition against the defendants Arnold Koenig, Fritz Jaeggi and the Niobrara Investment Company, but that the said plaintiff was not entitled to any relief as against the defendant Lysle I. Abbott; that the entire contract be rescinded and held for naught; and that the costs be taxed against the defendants Fritz Jaeggi, Arnold Koenig and the Niobrara Investment Company.

Counsel for the defendant, Mr. I. J. Dunn, makes the contention that the suit is brought in equity to rescind a contract made between the plaintiff and the defendants other than Abbott. Abbott testified that he drew the articles of incorporation as a lawyer; that up to that time he knew nothing of the Niobrara Investment Company; that Koenig and Jaeggi came to his office together to have him draw the articles of incorporation, and that he knew nothing of the proposed corporation; that he had been Koenig's attorney for a long time; that he (Abbott) took the legal steps necessary to organize the corporation; that Koenig said that he had never paid Abbott anything for his services and wanted to pay him in stock of the company. Abbott testified that he had given the corporation no consideration, except what was necessary to draw the papers, and that he knew nothing about the corporation. He appears to have known nothing about the proposed corporation, except what Koenig and Jaeggi told him. He said that he had not had anything to do with preparing the facts and statements that went into the prospectus, and had no information, except as he had received it from Koenig and Jaeggi. Abbott testified that he did not have anything to say to Mr. Horn, the plaintiff, and had no personal acquaintance with him. He did not know Mr. Horn, and did not know that he had any intention of investing in the company. This does not seem to be denied. Abbott testified that he had not attended to the

Horn v. Abbott.

printing of the prospectus, and that Mr. Jaeggi attended to it and furnished the money. Jaeggi knew that the company held contracts for the purchase of the land. Horn testified that he met Mr. Koënic at the La Salle hotel, Chicago, and that Koenig told him that everything was going fine, and said that if he (Horn) knew anybody that would like to invest in the Niobrara Investment Company he would like to meet him; that thereupon he and Koenig went to see the president of the Standard Underground Cable Company, a fifty-million dollar concern, and that he introduced Koenig to the president of the company; that the gentlemen then talked about their work, and that Koenig then talked of the big feature of the Niobrara Investment Company, that they owned the land, that they had it under contract, that they would develop water power for electricity; that Mr. Koenig also talked to a Mr. Klein along the same line; that Mr. Klein said to him (Horn) that the way Koenig talked Horn could not make a mistake in investing his money in the company; that Koenig then said to Klein that the company owned the land under contract; that the increase in value over the price paid should go into a power proposition and into the banking business, hotels, and such assets as might accrue out of the surplus of the land holdings. Horn appears to have testified that he introduced a Mr. Heidbrink to Mr. Jaeggi, and that Jaeggi then said that he would attend to the business. A letter dictated by Mr. Jaeggi and signed by Mr. Horn with the name of the Niobrara Investment Company and addressed to Mr. Heidbrink at Stages, South Dakota, was introduced in evidence. Exhibit 23, offered by plaintiff, Horn. Heidbrink was the last person they tried to interest in the company. Exhibit 23 shows that Horn was no infant, and that he had a seductive way about him that might have won a most wary capitalist. The charm of the letter is its apparent clearness of vision and knowledge of the conditions of the venture obtained at first hands. Horn seems to have known all about the certainty of the enterprise, and therefore

Horn v. Abbott.

did not need to obtain information from Abbott, or to rely upon any sort of assurance that Abbott's name as president might carry with it. He invites Heidbrink to "look into matters thoroughly." He wants Heidbrink to "take part in the development of this country"—only wants Heidbrink "to join us in this great undertaking with the small amount of \$20,000." He is also willing that, in addition, Heidbrink shall "take interest in the national bank which we are going to build in Niobrara." He predicts that he and Heidbrink in two years "will be members of the biggest concerns in the West," and winds up by saying that "our undertaking has even created interest in the commercial clubs of Nebraska, and we are sure of their support." Horn shows up as a promoter. Horn swore in an affidavit in the case of Irene Horn against himself that he did not have \$1,000 in the bank; "that the only bank he does business with is the City National Bank, Omaha, in which he has not to exceed the sum of \$43; and that affiant has no cash or other property, real or personal, or other income, except as herein stated." Afterwards in this case he testified that he swore to this affidavit without knowing what was in it; that he had not read it or any part of it. On cross-examination, as we understand it, he admitted that he had \$1,000 in the bank. This testimony is perhaps immaterial, except as it tends to discredit the defendant and to establish the fact that he is unworthy of belief. Of course, he may have been attempting to place some property beyond the reach of his former wife. She had a judgment against him. This affidavit is not commendatory of Mr. Horn. It leaves him liable to the charge that his hands are unclean and contains a suggestion that he should keep out of court. *Coppell v. Hall*, 7 Wall. (U. S.) 542; *McMullen v. Hoffman*, 174 U. S. 639.

The mere fact that Abbott was president of the corporation did not bind him to so manage the corporation as to make money for the stockholders or for the company itself. Nor is there any liability attaching to Mr. Abbott because his name appears as president of the corporation.

Horn v. Abbott.

Nunnally v. Southern Iron Co., 94 Tenn. 397, 28 L. R. A. 421.

The representations to Horn concerning the ownership of the land at the time of the deal with Horn were made by Jaeggi and Koenig. Abbott said nothing and was not present when they talked to Horn. If the representation that they had bought 2,500 acres more was made by Jaeggi and Koenig without Abbott joining in it in some way, then he was not liable in any event. Horn testified that he believed the statements of Jaeggi and Koenig. If he believed them, he had no occasion to rely upon Abbott.

Horn never talked to Abbott or made an independent inquiry. Jaeggi delivered the shares of stock to Horn. He was, and is, the owner. The stock appears to be Jaeggi's stock. Of course, Abbott was not in any way bound to make Jaeggi's stock pay. Nor was he responsible in any way for the exaggerated ideas or expressions of Mr. Jaeggi or Mr. Koenig. He did not compare with either of them in any way. He had been Mr. Koenig's lawyer. He was merely helping with the preparation of the articles of incorporation. He had no designs upon the pocketbook of Mr. Horn or upon the pocketbook of any other person.

The plaintiff does not seem to have talked with Mr. Abbott concerning the property, and Jaeggi seems to have been rather active. According to the plaintiff, Mr. Jaeggi showed him "a safe full of stocks and bonds, and told him that was just part of them, the rest of them was with the Peters Trust Company." Mr. Horn also testified: "Mr. Jaeggi told me that over \$30,000 worth (of bonds) had been already sold and paid for at that time. * * * He told me that the company is immense. * * * He told me they had already sold over \$30,000 worth of gold bonds; that he would float a couple of hundred thousand dollars worth of them in Europe, get foreign people in on the deal."

Horn seems to have placed a great deal of confidence in both Jaeggi and Koenig. He knew them both, and they

Horn v. Abbott.

both talked to him, according to his testimony, in such a way as to inspire confidence, if he believed them. On Mr. Horn's cross-examination he was asked: "Did anybody lead you to believe, or did anybody say to you, that Abbott as an officer of the company would be in any way liable for its debts and obligations? Did anybody say that to you or lead you to believe that? A. There was never such conversation. Q. Did you think Mr. Abbott, even if he was a stockholder, or officer, was or would become liable for the debts or obligations of this company, or to make it good? A. It never entered my mind."

That Horn's testimony when he testified against Abbott is unworthy of belief is in a measure established by the fact that he never went to see Abbott or complained to him in any way. "Q. After you became suspicious that Jaeggi and Arnold Koenig hadn't told you the truth, did you go to see Abbott? A. No, sir. Q. Did you ever call him up? A. No, sir. Q. Did you ever consult him about your savings, or the deal you had made, after you became suspicious? A. No, sir."

Whether any false representations were made by Abbott to the plaintiff would be material if it was charged and proved. But it is not. The plaintiff is not shown to have relied upon any representation that Abbott made. He appears to have relied upon his own judgment and the representations of Koenig and Jaeggi.

Under section 8198, Rev. St. 1913, we are called upon to render our judgment in this case *de novo*. *Northwestern Mutual Life Ins. Co. v. Mallory*, 93 Neb. 579.

There is no proof that Horn relied upon anything that Abbott told him, if, as a matter of fact, Abbott told him anything, which is not shown.

In order to maintain an action for deceit, it is necessary to show that the plaintiff had a right to rely upon the representations made, if any, and did rely upon the same, and that they were false, and that he altered his condition in consequence thereof and suffered damages thereby. *Runge v. Brown*, 23 Neb. 817.

In the above case of *Runge v. Brown*, it was said in the body of the opinion: "But there is no proof that the representations alleged to have been made by plaintiff in error were relied upon by defendant in error, and induced him to make the sale referred to. Upon this point we think the authorities are substantially all one way. If defendant in error sold the sheep to Musheid, upon his own judgment, and wholly uninfluenced by the alleged statements of plaintiff in error, it is clear that such statements could not result in damages to him, however untrue they might have been, unless they were relied upon by defendant in error, and that, so relying, he sold the sheep, received the notes, and suffered damage thereby. It must appear that, relying upon the statements, he altered his condition, and was damaged thereby, that this change in his condition was in consequence of the representations, as well as that the representations were untrue."

In *Stetson v. Riggs*, 37 Neb. 797, this court held, as stated in the body of the opinion: "The defense of Riggs was, in effect, an action against Stetson for damages for false representation made by the latter. This answer, then, to be good, must allege with reasonable certainty: (a) That Stetson made some representation to Riggs, meaning he should act on it; (b) that the representation made was false; (c) that Riggs believed such representation to be true, relied and acted upon it, and was thereby damaged"—citing *Byard v. Holmes*, 34 N. J. Law, 296, and cases there cited.

"False representations as the basis of an action, whether for damages or for rescission of a contract, are such only as in some manner actually mislead the complaining party to his damage." *American Building & Loan Ass'n v. Bear*, 48 Neb. 455.

"Actionable fraud must relate to matters material to the transaction involved. Mere collateral inducement, although fraudulently made, of itself affords no ground for the rescission of a contract, or for the recovery of damage

against the offending party." *American Building & Loan Ass'n v. Bear*, 48 Neb. 455.

We also refer to *Jakway v. Proudft*, 76 Neb. 62, where this court held, as stated in the body of the opinion, that an instruction was prejudicially erroneous which "submitted the case to the jury on the theory that, if the representation of the indebtedness of the corporation was false, and if such representation was relied upon by the plaintiff as an inducement to the contract, he was entitled to rescind, whether any actual damage accrued by reason of the representation or not."

Also, see *Lorenzen v. Kansas City Investment Co.*, 44 Neb. 99, where this court held, as stated in the syllabus: "In an action in the nature of an action of deceit, it is necessary not only to show the making of false representations justifiably relied upon, but in addition it must be made directly and not by conjecture to appear that, from such false representations and reliance upon them, there resulted a direct and actual loss to plaintiff."

In 1 Story, Equity Jurisprudence (13th ed.) sec. 203, it is said: "And in the next place the party must have been misled to his prejudice or injury; for courts of equity do not, any more than courts of law, sit for the purpose of enforcing moral obligations or correcting unconscientious acts, which are followed by no loss or damage. It has been very justly remarked, that to support an action at law for a misrepresentation there must be a fraud committed by the defendant, and a damage resulting from such fraud to the plaintiff."

In Bispham, Principles of Equity (8th ed.) sec. 217, it is said: "Fraud without damage is no ground for relief at law or in equity."

See, also, the following cases: *Taylor v. Guest*, 58 N. Y. 262; *White, Adm'x, v. Smith*, 39 Kan. 752; *Humphrey v. Merriam*, 32 Minn. 197; *Clark & French v. Tennant*, 5 Neb. 549.

The bonds purchased by the plaintiff seem to have been the property of Jaeggi, and a bargain with Jaeggi was not

Horn v. Abbott.

a bargain with the Niobrara Investment Company, nor was it a bargain with Abbott.

Any fraudulent representations made by Jaeggi or by Jaeggi and Koenig were not the representations of Abbott.

1. The plaintiff, as to the defendant Abbott, is not shown by the evidence to have been misled or in any way deceived by the prospectus or by anything that was said or done by the defendant Lysle I. Abbott.

2. The defendant Abbott is not shown to have been in the management of the affairs of the company.

3. Horn seems to have known that Jaeggi and Koenig were the real parties in interest, and that they were in the actual control of the corporation, and that the defendant Abbott was only assisting them as counsel, and that what he did was done as a lawyer, and not otherwise.

4. Horn relied upon the facts within his own knowledge.

5. Under the relations existing between Horn, Jaeggi and Koenig, as shown by the evidence, Horn must have known that Jaeggi and Koenig were the real parties in interest and in control of the corporation.

6. The testimony of the defendant Lysle I. Abbott does not appear to be successfully controverted. He seems to be free from any fraudulent purpose or act. We are unable to hold that the plaintiff, Horn, has established the case set up by him in his petition.

The judgment of the district court appears to be sustained by the evidence, and it is

AFFIRMED.

SEDGWICK, J., not sitting.

ELBERN N. COONS v. STATE OF NEBRASKA.

FILED NOVEMBER 17, 1916. No. 19431.

Burglary: SUFFICIENCY OF EVIDENCE. The evidence examined, and found to support the verdict of the jury declaring the defendant guilty.

ERROR to the district court for Cherry county: **WILLIAM H. WESTOVER, JUDGE.** *Affirmed.*

Robert G. Easley and Walcott & Walcott, for plaintiff in error.

Willis E. Reed, Attorney General, and Charles S. Roe, contra.

HAMER, J.

The plaintiff in error, hereafter called the defendant, brings this case here so that we may review the judgment of the district court for Cherry county. He was arrested August 13, 1915, and was charged with the crime of burglary alleged to have been committed on or about the 29th day of July, 1915. On the 6th day of October, 1915, he was sentenced to serve an indeterminate sentence of from one to ten years in the penitentiary. The evidence against him is circumstantial. Ten instructions were given by the court upon its own motion. In the motion for a new trial error is alleged in the giving of these instructions, but there is no discussion of any of them in the defendant's brief. There was a motion by the defendant for a directed verdict, but this motion was overruled. The insufficiency of the evidence to sustain the verdict is apparently the main question upon which defendant's counsel rely.

Briefly stated, the facts are as follows: One George O'Kieffe was building a house on his farm. On the evening of July 28, 1915, O'Kieffe and the men working with him left the house, which was then nearly completed. The

Coons v. State.

windows and doors were all in, except that in one of the openings prepared for a window boards were nailed across the opening. The next morning when the men returned they found that the house had been entered during the night season and numerous articles, including log chains, carpenter tools, paint brush, and a pair of pincers, had been taken away. There were evidences that paper had been burned in the house to furnish light for the burglars. The country is sparsely settled. Rain had fallen in the night. A fresh wagon track was followed from the house by O'Kieffe and some of the men a distance of eight or ten miles to near the home of defendant. About a mile away from his home the wagon had been stopped, a hole dug in the ground, and certain articles buried. Among them were carpenter tools and the paint brush. The wagon track left the main road near the defendant's place, and after a circuitous route across the prairie was finally lost near the defendant's house. A wagon was standing in the yard of defendant, and there was a smear of moist white paint upon the bottom of the box. The paint brush taker was moist with white paint. The defendant's team looked fagged and weary, and showed signs of having been hard driven. The harness lay by the wagon tongue as it may have been thrown down when the team was unhitched. The stolen pair of pincers was found on the ground a short distance from defendant's house. When questioned regarding the paint on the wagon, the defendant stated that it had been there a long time, but other witnesses stated that the paint was still moist so that it came off when it was rubbed with the finger. Defendant's witnesses testified that the horses were fagged-out from hauling a heavy water tank; that the trail on the prairie near the house was made by the team and wagon when used to pick up fuel—"cow chips"—and that defendant was at home all that night.

We are convinced that the jury were justified in disbelieving the testimony of defendant's witnesses, and that

State, ex rel. Parks Co., v. Dahlman.

they were equally justified from the circumstantial evidence in finding the defendant guilty.

It is possible that the conclusion reached by the jury upon the circumstantial evidence is wrong, but the jurors were inhabitants of the county, and much better qualified to determine the truth or falsity of the testimony than is this court. There is sufficient evidence in the record, if the jury disbelieved the defendant's witnesses, to uphold the conviction.

The value of the property taken was found by the jury to be \$35.25, only a few cents more than an amount for which the defendant could have been convicted only of petit larceny. He had a wife and children. So far as the record shows, this is his first offense. It may be doubted whether further punishment than he has already suffered is advisable. It is to be hoped that the parole board will take these facts into consideration.

The judgment of the district court is

AFFIRMED.

STATE, EX REL. JAMES J. PARKS COMPANY, APPELLEE, v.
JAMES C. DAHLMAN ET AL., APPELLANTS.

FILED NOVEMBER 17, 1916. No. 19685.

1. **Municipal Corporations: CONSOLIDATION: ASSUMPTION OF OBLIGATIONS.** Where four proposed paving improvement districts had been created in South Omaha, and the property owners had indicated the kind of material they desired used, and the contracts had been let and bonds given for the performance of the same, and each of the foregoing steps had been taken under the direction of the city attorney and the city engineer of the city of South Omaha, and before the consolidation of the said city of South Omaha with the metropolitan city of Omaha, as contemplated by the statute, the contracts so entered into are valid, and they must be performed by the consolidated city of Omaha, although the statutory time allowed property owners in which to select material had not expired in any of the districts before the consolidation took place.

State, ex rel. Parks Co., v. Dahlman.

2. ———: **STREET IMPROVEMENTS: CONTRACTS.** The charter of the city of South Omaha provided that property owners might designate the material to be used in street paving by filing a petition within 20 days from the advertisement of bids. If such petition was filed within the 20 days, the council could at once contract for the improvement without waiting for the expiration of the 20 days' time.
3. **Mandamus: MUNICIPAL CONTRACTS: ENFORCEMENT.** The act providing for the consolidation requires the consolidated city to perform all valid, unperformed, subsisting contracts made by the city of South Omaha, and a writ of mandamus to compel such performance was properly issued by the district court.

APPEAL from the district court for Douglas county:
CHARLES LESLIE, JUDGE. *Affirmed.*

John A. Rine, W. C. Lambert and L. J. TePoel, for appellants.

Murphy & Winters, contra.

HAMER, J.

This is a proceeding in mandamus to compel the city of Omaha to carry out certain paving contracts entered into by the city of South Omaha before the consolidation of the two cities. Four paving districts are involved, Nos. 128, 130, 133, and 134.

It appears that after the districts were created the city clerk of South Omaha, pursuant to the charter, gave to the property owners in the several districts notice by publication that the 20 days allowed the property owners in which to designate material, or to change any designation previously made, would not expire in any of the districts until after June 21, 1915, the date of the consolidation of the two cities; that in each of said districts petitions designating the materials were filed, after notice was given, prior to the consolidation and within the 20 days allowed for the selection of material or to change the designation thereof; that, before the consolidation, the city council of South Omaha adopted resolutions awarding to the James J. Parks Company a contract for the performance of the work, and the contract, together with the bond, was

State, ex rel. Parks Co., v. Dahlman.

duly approved. The respondents, the mayor and council of the city of Omaha, refused to recognize these contracts or to provide funds for carrying on the work, and this proceeding was brought to compel them to draft and pass the necessary ordinances providing for the issuance and sale of the district improvement bonds of the city of Omaha for the purpose of paying for the improvements in these districts, the same to be issued under the laws and charter of the city of South Omaha at the time of its consolidation with the city of Omaha. An alternative writ of mandamus was issued. The return to this writ sets forth that at the date of the consolidation, June 21, 1915, the relator did not have a completed, valid and subsisting contract with the said city of South Omaha for the work in any of said districts; that the proceedings had not progressed beyond the point where a valid contract could have been entered into, for that 20 days from the last date for publication for bids had not expired in any of said districts during which the property owners therein might have designated different material from that selected; that no contract in fact was made or attempted to be made prior to the expiration of the said 20 days; that the instruments signed as contracts were not dated and were not intended by those signing the same to be valid or subsisting contracts until after the expiration of the 20 days in which to designate said material; and that up to the time of the consolidation there had not been signed in said districts, or any of them, valid subsisting petitions designating material; and that, as to some of the pretended petitions designating material, names had been withdrawn in sufficient numbers to defeat the request of the petition; that the respondents are without power to issue and dispose of bonds of the city as a means of obtaining funds with which to pay for said work; that under the charter of the city of Omaha warrants or bonds may not issue for the payment for improvements such as paving prior to the time when such improvements have actually been made, and sufficient assessments have actually been levied, and a

State, ex rel. Parks Co., v. Dahlman.

fund created to meet such obligations; that, in the absence of a completed and valid contract, the respondents had no authority to issue bonds or to create a fund under the laws and charter of South Omaha as the same existed at the time of the consolidation; that the respondents were without authority to levy or assess charges against the property of the said districts for such improvements under either the laws and charter of the city of South Omaha, or the city of Omaha; that the said proceedings in the said districts terminated and became of no effect upon the consolidation of South Omaha with the city of Omaha; and that, as the proceedings had not progressed to a point where a complete and consummated contract or contracts had been made, the city of Omaha was not required to carry out and perform the said contracts.

Upon the trial a writ of mandamus was awarded as prayed. A motion for a rehearing was denied, and the respondents have appealed.

Section 3, ch. 212, Laws 1915, provides, among other things: "And the metropolitan city shall succeed to all the property and property rights of every kind, contracts, obligations and choses in action of every kind held by or belonging to the city or village consolidated with it, and the metropolitan city shall be liable for and recognize, assume and carry out all valid contracts, obligations, franchises and licenses of any such city or village so consolidated with it."

The foregoing language indicates very clearly that the consolidated city receives the property, property rights, and every kind of contract or obligation or chose in action held by the city or village consolidated with the metropolitan city. It also clearly shows that the metropolitan city, in addition to receiving the property of the village or city incorporated with it, assumes to carry out all valid contracts, obligations, franchises and licenses of the city or village consolidated with it. If the city of South Omaha had incurred an obligation by reason of what it did, then it is incumbent upon the city of Omaha to carry

State, ex rel. Parks Co., v. Dahlman.

out the contract or obligation, whatever it may have been. It is contended here that there was no contract because of the fact that there were 20 days from the last date of the advertisement of bidders within which the abutting property owners could designate the material that they desired to have used; that the 20 days had not expired when the cities were consolidated, and therefore that there was no pending contract. It was the view of the district court that the right to withdraw from the petitions existed only up to the time that the council acted upon the petitions, and that, when they acted upon such petitions, then the contracts became valid contracts, and that in the first place the city of South Omaha would be obligated to carry out the contracts, even though the full 20 days had not expired. It is said on page 20 of appellant's brief that, if the proceedings had by the city of South Omaha resulted in valid contracts, then "it may be that relator is entitled to the relief he claims." We are inclined to adopt the views of the district court.

Section 4719, Rev. St. 1913, provides: "The property owners of record within any district shall have twenty days from the last date of publication of the bids for any improvement, to designate by petition, to be filed with the city clerk, the specific material selected from those designated in the bids received, which they desire used in improving of the street or other public thoroughfare within said district, and, in case the record owners of the majority of the taxable foot frontage of property abutting upon said street or other public thoroughfare to be improved, file their petition within such twenty days, designating the specific material which they desire used in making such improvement, then in that event, the mayor and city council shall order said improvements made with the specific material so designated; but, in case there is no petition filed by the owners of a majority of the foot frontage of taxable property as aforesaid, within said twenty days, then the mayor and council shall by resolution, designate

the specific material they desire to be used, and award the contract to the lowest responsible bidder on said material."

The language of the section indicates that it was in the mind of the legislators when they passed the act that the abutting lot owners might not make any request with respect to the kind of material to be used, and then it would be for the council to determine what kind of material it would use. We have not been told that any objection has been made concerning the material to be used. It also appears that the council acted upon the petition. If no objection was made by the abutting lot owners at that time or since, then in any event the order of the council of South Omaha must stand.

Many authorities are cited in the brief of counsel for the appellees showing that the abutting lot owners have no right to withdraw after the action of the council. In this case the council did all that could be done prior to the expiration of the 20 days. If the city of South Omaha could make a contract, then it has been made, and it is the duty of the city of Omaha to carry it out. Apparently, this is a case where the abutting property owners desire that for which they petitioned. We are of the opinion that the contracts made were binding upon the city of South Omaha at the time of the consolidation, and, if so, they must be assumed by Omaha.

Section 6 of the act providing for the consolidation of South Omaha with the city of Omaha, being a part of chapter 212, Laws 1915, provides, in substance, that all taxes or special assessments which any city or village consolidated may have been authorized to levy or assess, but which are not "levied or assessed at the time of such consolidation, for any kind of public improvements" in process of construction or contracted for, may be levied or assessed by such metropolitan city as consolidated. The following cases seem to adopt the principle involved: *City of New Orleans v. Stewart*, 18 La. Ann. 710; *Irwin v. Mayor*, 57 Ala. 6; *Pavey v. Braddock*, 170 Ind. 178.

Galt v. Hildreth.

It may be true that, when Omaha acts for itself, it would have no power to issue bonds for the payment of indebtedness; but in this case it would seem that the city of Omaha undertook to carry out the contracts which had been made by the city of South Omaha. If so, it is for the city of Omaha to take such steps as may be necessary to pay the indebtedness incurred in the same manner that such indebtedness would have been paid by the city of South Omaha, provided it had not been incorporated into the city of Omaha. We see nothing in the way of issuing bonds after the manner the city of South Omaha might have issued them, and in levying assessments upon the particular property benefited, as South Omaha might have done if the consolidation had not been made.

The judgment of the district court is

AFFIRMED.

AMOS A. GALT ET AL., APPELLEES, v. CARSON HILDRETH,
APPELLANT.

FILED DECEMBER 9, 1916. No. 18938.

Opinion on motions for rehearing of case reported, *ante*, p. 15. *Former judgment modified.*

PER CURIAM.

This is a hearing upon questions presented in motions for rehearing. The issues and the evidence are stated in the first opinion. *Galt v. Hildreth, ante*, p. 15. At the time plaintiffs purchased from defendant Hildreth a controlling interest in the Franklin State Bank, he guaranteed that, if the net profits of the bank for the year 1912 should not be \$8,000, he would pay plaintiffs three-fifths of the difference between that sum and the net profits.

Galt v. Hildreth.

He also agreed that plaintiffs might select notes in the bank of the face value of \$3,000, and that he would pay the same to the bank.

The Galts brought this action against Hildreth to recover three-fifths of the difference between the actual profits and the guaranteed profit. The bank was made a party defendant, and filed a cross-petition in which it sought to enforce against Hildreth his liability upon the note clause of the contract, and also sought to collect from him the amounts due on notes alleged to have been made, indorsed and guaranteed by him. The trial court found that there was due from Hildreth to plaintiffs upon the profit clause of the contract \$1,607.78. This was affirmed by this court, and is adhered to, except that plaintiffs should have interest thereon at the rate of 7 per cent. per annum from January 1, 1913.

The remaining questions relate to the causes of action pleaded in the bank's cross-petition against Hildreth. The contract between plaintiffs and Hildreth provided that plaintiffs should have the right to select notes of the face value of \$3,000, and Hildreth agreed to pay to the bank "the face value with accrued interest from November 10, 1911, to January 1, 1913, on said notes." Hildreth contends that the recovery allowed upon this clause of the contract is excessive. The evidence shows that March 12, 1912, Hildreth paid a note of \$500. This would leave notes of the face value of \$2,500 to be selected. In the settlement of the matters relating to the Curtis land, Hildreth gave his check for \$502.50, and it was agreed that this should apply upon his liability under the note clause of the contract. The cross-petition of the bank alleges that there was due under the note clause the sum of \$2,301.17, and prayed judgment for such sum, "with interest thereon from January 1, 1913, at the rate of 7 per cent. per annum." The district court decreed that plaintiffs should select notes of the face value of \$2,500, and that, in case Hildreth failed to pay the same within 40 days, the bank should have judgment against him for \$2,500,

Galt v. Hildreth.

with interest thereon from November 10, 1911. This was error. The decree should have been for \$2,301.17, with interest at 7 per cent. per annum from January 1, 1913.

It is also contended by the bank that the rule announced in the fifth paragraph of the syllabus in the former opinion is not applicable to the facts. It was held: "The defense successfully made by one of the signers and indorsers of a note, if not made on purely personal grounds, will bar a future action by the same plaintiff on the same obligation against another joint defendant." *Galt v. Hildreth, ante*, p. 15.

In its cross-petition the bank seeks to recover upon the so-called "brickyard" notes, known as the "Chaney" note and the "Gettle" note. Hildreth was one of three makers of the Chaney note and one of four indorsers of the Gettle note. In former actions brought by the bank against all the makers and indorsers, judgments for all the defendants, except Hildreth, who made no answer, were affirmed in this court. *Franklin State Bank v. Chaney*, 94 Neb. 1; *Franklin State Bank v. Gettle*, 96 Neb. 60. Hildreth filed no answer in those actions because he was representing the bank in the litigation and was to be its principal witness. His default was entered. After the judgments for the answering defendants were affirmed, the bank moved for judgment against Hildreth upon the default. Hildreth obtained leave of court to file an answer pleading the judgment in favor of his comakers and coindorsers as an adjudication in bar of the bank's claims. The second and third causes of action set forth in the bank's cross-petition in the present case are upon the notes involved in the two cases mentioned. Upon the trial of the present case it was stipulated that the original actions upon the brickyard notes should be consolidated with this case. The bank contends that the judgments in those actions are not conclusive of Hildreth's nonliability, because it does not appear that the judgments were founded upon a defense that was not personal to the prevailing defendants. One defense pleaded was that the notes were deliv-

Galt v. Hildreth.

ered to the bank merely to evidence its interest in the brickyard property, it having released its claim thereto, and that the notes were without consideration and were never intended to be enforced. The other defense was that, after the delivery of the notes, the makers and indorsers surrendered to the bank all claim to the brickyard property, and that the bank thereupon released them from any and all liability upon the notes. *Franklin State Bank v. Chaney*, 94 Neb. 1; *Franklin State Bank v. Gettle*, 96 Neb. 60.

Each of these defenses was a defense upon the merits, and was not a defense personal to the pleaders. If the first defense was established, there was never any liability upon the notes. If the notes were delivered merely to evidence the interest of the bank in the property and with the understanding that they were not to be enforced, there was no liability either on the part of Hildreth or the other makers and indorsers. If the plea of release was established, all the makers and indorsers were released. If the brickyard property was surrendered to the bank in consideration of the release of the defendants in the actions on the notes, it was a satisfaction and payment. The release of those makers and indorsers also released Hildreth. *Scofield v. Clark*, 48 Neb. 711; *Huber Mfg. Co. v. Silvers*, 85 Neb. 760.

It is also contended that Hildreth is estopped to plead his nonliability on the notes, because at the time the Galts purchased stock in the bank its records indicated that he was liable thereon, and that he so represented. The action upon the notes is brought by the bank. This is not an action by the Galts to recover for misrepresentation in the sale of the stock. Facts constituting an estoppel operating in favor of the bank were neither pleaded nor proved. It follows that the former adjudications released Hildreth from liability on the brickyard notes.

Except as herein modified, the judgment of affirmance is adhered to.

FORMER OPINION MODIFIED.

IN RE SUPREME COURT COMMISSIONERS.

FILED DECEMBER 9, 1916. No. 19964.

PER CURIAM.

In several cases that have been submitted to the supreme court commission and decided by the court, motions for rehearing have been filed. The contention is made that the act of 1915 creating the supreme court commission is unconstitutional and void, because the appellant has been deprived of his right to be heard in the court of last resort, as provided for in the Bill of Rights: "The right to be heard in all civil cases in the court of last resort, by appeal, error, or otherwise, shall not be denied." Const., art. I, sec. 24. It is said, also, that the act deprives appellant of its property without due process of law, and denies it the equal protection of the laws, as guaranteed by the Fourteenth amendment to the Constitution of the United States. In one case it is urged that full findings of fact were not made by the commission as required by the statute; that permission "to be heard on printed briefs and by oral argument * * * before the commission" is insufficient, for the reason that the commission is not the court; that the provision that the unsuccessful party "shall have his motion for rehearing before the commission" is an attempt to take away its constitutional right to be heard before the court. It is said that the evident purpose of the act is to "clear the docket, regardless of judicial proceedings," and the only thing left for the supreme court is the perfunctory duty to approve and adopt the report of the commission and have it spread upon the records; there being no provision that the court may disapprove the report or order a rehearing of the case.

Much reliance is placed upon the opinion in the case of *State v. Noble*, 118 Ind. 350, 10 Am. St. Rep. 143, de-

In re Supreme Court Commissioners.

cided in 1888, which holds that, though the commissioners provided for by the Indiana act were merely assistants of the court, it purported to confer judicial power upon them, and was therefore unconstitutional. In this state—mainly on account, no doubt, of the provision of the Bill of Rights referred to, which is unique, and is not found in the Constitution of any other state, and which has done much to delay justice and to enable the poor litigant to be worn out by unwarranted and vexatious appeals to an already overburdened court merely for delay—it became necessary, nearly a quarter of a century ago, to provide assistance to this court.

The first act providing for supreme court commissioners was passed in 1893. The purport of the act, in so far as it prescribed the duties of commissioners, is the same as in the present act. In *In re Supreme Court Commissioners*, 37 Neb. 655, its constitutionality was upheld on the ground that the commissioners were not judges and their opinions were of no force or validity until examined and approved by the court. In *Randall v. National Building, Loan & Protective Union*, 43 Neb. 876, the question was again considered and the same conclusion reached. A like result was arrived at in California. *People v. Hayne*, 83 Cal. 111, 7 L. R. A. 348. All these cases were decided after the decision in the *Noble* case was published.

Under the practice in this court, in all cases assigned to the commission for examination a written report of the facts disclosed by the record is made to each member of the court, and a proposed journal entry submitted; these reports are examined by each judge, sometimes they are approved, sometimes they are referred to the commission for further information. If the court has any doubt with respect to the facts stated or conclusions reached by the commission, it is not infrequent to set the case for reargument before the court proper. The court itself exercises its judgment upon each case, and not until the court is satisfied is the report of the commission approved, and a judgment rendered. In the case of motions for

In re Supreme Court Commissioners.

rehearing, like reports are made. The case is then assigned specially for examination and report as in cases heard before the court proper, and not until the report made by a member of the court has been examined and passed on by the court is the motion for rehearing sustained or denied.

The objection, in one of the cases tried to a jury, that full findings of fact have not been made cannot be sustained. The law makes the jury the determining body with respect to the facts, and if there is evidence sufficient to support the verdict, and it is not clearly or manifestly wrong, it will not be interfered with by a reviewing court. If the statements of fact made by the commission to the court convince it that the evidence is sufficient to sustain the verdict, it is unnecessary to recite these facts at length in the journal. A detailed statement of the facts is not given in a large proportion of the opinions filed by the court. There is no more necessity for it in the one case than in the other.

Objection is made in some of the briefs because the act authorizes the judges of the supreme court to appoint three supreme court commissioners "who shall first be recommended for such appointment by the governor." The court is under no obligation to appoint commissioners at all. Unless the men whose names were suggested by the governor had commended themselves to the court as proper and fit persons in point of character and ability to fill such responsible positions they would never have been appointed.

Justice delayed is often justice denied. The serious condition in which the people of the state have been placed by the absence of restriction upon the right of appeal and the consequent delay convinced us that it was for the public welfare that the court be not unduly sensitive as to its clear and undoubted constitutional right to ignore or reject all recommendations for the appointment, by whomsoever made, and, when the names of fit and proper men were suggested, to make the appointment

Crowell v. Skillicorn.

from the list. The work of the commission has justified the selection made. That portion of the act which attempts to confine the right to appoint to nominees of the governor is clearly void. Neither the legislature nor the governor has the right to dictate whom the court shall appoint as its referees or assistants. The court might as well assume to appoint the chief clerk or sergeant-at-arms of each house of the legislature. The court, the legislature, and the executive are co-ordinate branches of the state government, and under the Constitution neither can exercise powers conferred by the people upon the other.

The act, if strictly and literally construed, is in part violative of some constitutional provisions, but the void portions may be and have been disregarded as unessential, and, as construed by the court, a valid act is left.

The report of the findings made by the commission is similar to the report of a referee, and is not in any sense a judgment. The reports are not approved *pro forma*. The commission renders no judgments, makes no orders, exercises no judicial functions.

The act is an authorization by the legislature that commissioners or referees may be appointed to aid in disposing of the accumulated work, and, no appropriation having been made, it imposes a moral obligation to compensate these authorized assistants. Such an act is valid.

CHARLES CROWELL, APPELLANT, v. WILLIAM SKILLCORN ET AL., APPELLEES.

FILED DECEMBER 9, 1916. No. 19028.

Contracts: RESCISSION: LACHES. When the grantee in a deed assumes and agrees to pay a mortgage indebtedness on real estate covered by the deed, but fails to keep this stipulation of his contract, and suffers the land to be sold under the mortgage, and sheriff's deeds to a third party to be issued, and he stands idly by for two years

Crowell v. Skillicorn.

thereafter, he will not then be permitted to rescind, nor be heard to assert in a court of equity that he was deceived as to the quality, quantity and character of the land, and that his grantor held no title thereto, and therefore conveyed no title to him, when his title to, and possession of, the land has never been called in question (except only by the enforcement of the mortgage liens which he had assumed and agreed to pay), without putting, or offering to put, the other party in *statu quo*.

APPEAL from the district court for Holt county: WILLIAM H. WESTOVER, JUDGE. *Affirmed*.

Edwin J. Stason and P. W. Cain, for appellant.

M. F. Harrington and C. E. Dean, contra.

MORRISSEY, C. J.

This is an action by plaintiff to rescind a contract for the exchange of lands and to cancel a deed conveying to defendants 970 acres of land in Holt county and to quiet title thereto. From a judgment of dismissal, plaintiff has appealed.

April 23, 1907, plaintiff and defendants entered into a contract for the exchange of plaintiff's Holt county land for \$1,250 and land owned by defendants seven miles northwest of Onawa, Iowa, referred to as: "The following described property situated in the county of Monona, state of Iowa, to wit: Lots 1, 2 and 3 in section 32, and lot 3, also southwest quarter of southwest quarter in section 33, all in township 84, range 46, and the northeast quarter of the northwest quarter and lot 1 in section 5, township 83, range 46, containing 407.87 acres, more or less, together with all lawful accretions thereto."

The land conveyed by defendants was subject to two mortgages for \$7,000, which plaintiff assumed and agreed to pay. Plaintiff's land was subject to a mortgage for \$4,860, which defendants assumed. Defendants paid plaintiff \$1,250 in cash, and also allowed him the rent for the Holt county farm for 1908, estimated at \$700. Plaintiff took possession of the land conveyed to him in 1908. In July of that year the greater part of the land was over-

Crowell v. Skillicorn.

flowed by high water of the Missouri river. April 24, 1908, the owner of one of the mortgages commenced an action of foreclosure, and October 16, 1908, the property was sold at sheriff's sale, and November 22, 1909, redemption not having been made, a deed was executed to the purchaser at such sale, March 6, 1911. Without previous notice of his intention to rescind the contract of exchange, plaintiff commenced this action. He alleged that defendants were guilty of fraud in representing the quantity, quality and value of the land, and in representing that the land was not subject to overflow. He also alleged that the land conveyed to him was the former bed of the Missouri river, a navigable stream, and that under the laws of Iowa the land belonged to the state. During the trial the petition was amended to allege that the land belonged to riparian owners on the Nebraska side of the river, and was not in Iowa, and did not belong to defendants.

Summarized, the undisputed facts show: Defendants acquired title to the Monona county land in 1904 in an exchange for an equity in an electric light plant. They listed the land for sale with Fred Lawson, a real estate agent at Glenwood, Iowa. The latter was informed that plaintiff desired to trade his Holt county land for Iowa land, and, after correspondence, plaintiff came to Glenwood. He accompanied Lawson to Onawa. From there, in company with Will Hawkins, a real estate agent at Onawa, they drove over the land. Upon returning to Onawa plaintiff made a written offer to exchange his land for defendant's land and \$2,200. He also offered to pay Lawson \$100 if he could induce defendants to make the trade. This offer was sent to defendants. William Skillicorn, one of the defendants, in company with Lawson, made a trip to Holt county and inspected plaintiff's land. Subsequently C. H. DeWitt, the other defendant, also made an inspection of plaintiff's land. Later the contract of exchange was executed. The consideration named in each deed was \$30,000.

Plaintiff contends that defendants, and their agents, represented to him that there were 407 acres of surveyed lands, and enough accretion land to make 1,000 acres. The original government survey shows that there were 277 acres. The deed by which defendants acquired title described the land by the terms of the government survey, and as "containing 407.87 acres, more or less, together with all lawful accretions thereto." The testimony of defendants indicates that they told plaintiff there were 407 acres of "deeded" land, and produced the conveyance to themselves showing this: that they informed plaintiff they had not surveyed the land, but thought there was enough accretion land to make 1,000 acres. Plaintiff was a farmer and had inspected the land. Defendants were not guilty of misrepresenting to the plaintiff the quantity of land.

Plaintiff also contends that defendants deceived him as to the quality and value of the land. Testimony on behalf of defendants shows that the land was worth \$25 or \$30 an acre for "trading" purposes. Plaintiff's land was worth from \$10 to \$15 an acre. The consideration named in each deed was a "trading" value, and was far in excess of the actual value. Plaintiff lived in Iowa from 1873 to 1876, about three miles southwest of the land which defendants conveyed to him. He was familiar with the fact that the Missouri river was a shifting river. He testified that he asked defendants' agents whether the river overflowed the land, and was told that it did not do so. He also asked defendant DeWitt whether the river overflowed, and was told that it had not while defendants owned the land. The agents deny that they were asked whether the river overflowed the land. The evidence justifies the inference that plaintiff at the time knew that the land had formerly been overflowed. He testified that he knew that the river had run south and east of the land he was inspecting, and knew that the land was much lower than the land east of the old bed of the river. He has lived within a few miles of the Missouri river the

Crowell v. Skillicorn.

greater part of his life, part of the time on the Iowa side, a few miles southwest of the land in question. The record indicates that plaintiff and defendants held title to incumbered lands which could not readily be sold for cash, and that plaintiff believed, after a good inspection of the land, that he had made a good bargain. In view of plaintiff's familiarity with the actions of the Missouri river and his acquaintance with lands along the river, the evidence does not justify a finding that he was deceived either as to the quality or the value of the land.

Plaintiff contends that the evidence shows that the land was in Nebraska, and not in Iowa, and that defendants were guilty of fraud in representing that they owned the land and that it was in Iowa. It was stipulated that, when the government survey was made in 1853 and when the patent was issued, the land was riparian land on the east side of the Missouri river. Previous to 1876 the river had moved eastward and overflowed all but one acre of the patented land. From 1866 to 1876 the river gradually shifted its course westward again. A sandbar was thrown up in the river. In 1876, within two or three months, the river made a cut-off through the sandbar. The present channel is a mile and a half west of the government survey line of 1853. There is a "chute" between the land conveyed by defendants and the sandbar, west of which the river flows. In 1894 the land between the government survey and the chute, comprising 135 acres, was surveyed by the county, and has since been taxed by Monona county, Iowa. Plaintiff argues that the change in the course of the river was not gradual, but was sudden, amounting to an avulsion, and that the state boundary did not change, and that the land is within the Nebraska half of the bed of the stream. Plaintiff has not shown that there was a sudden avulsion of the stream to overcome the presumption that the land on the east side of the Missouri river is in Iowa. The land conveyed to plaintiff had been assessed by the state of Iowa since 1894. Plaintiff's title to the land has not been questioned either

Stoica v. Swift & Co.

by individuals or the state. There is nothing to indicate that it would have been questioned.

The real estate was mortgaged, and plaintiff took his deed subject to this mortgage incumbrance, which he assumed and agreed to pay. He broke this stipulation of his contract, and permitted the land to be sold under the mortgages. Plaintiff took possession of the land in 1908. The same year this mortgage foreclosure was commenced. A year later the sale was confirmed and deed issued. This suit was not commenced until 1911. He waited more than two years after the foreclosure of the mortgage without making any move to rescind. If the property had been misrepresented, he must have known it before the time for redemption from the mortgage foreclosure had expired. If he had any right to rescind the contract, and contemplated doing so, in good conscience, he ought to have made his intention known before the mortgage foreclosure was completed, and not wait until after whatever equity of redemption he, or his grantor, possessed had been extinguished. Having broken the stipulation in his contract to pay the mortgages, and having put it beyond his power to reconvey such title as he received, he cannot be heard to complain of what he alleges is a paramount title in somebody else who has never sought to assert title. The judgment is

AFFIRMED.

SEDGWICK, J., not sitting.

JOHN STOICA, APPELLEE, v. SWIFT & COMPANY, APPELLANT.

FILED DECEMBER 9, 1916. No. 19524.

Master and Servant: EMPLOYERS' LIABILITY ACT: AWARD. In an action under the employers' liability act (Rev. St. 1913, ch. 35) the court may consider how far the injury will in all probability disable the plaintiff from engaging in those pursuits and occupations for which,

Stoica v. Swift & Co.

in the absence of the injury, he would have been qualified, and consider the health of the plaintiff and his general physical condition before the injury, as compared with his condition in these respects afterwards, and, when the proof shows a partial permanent disability, award damages for such injury in the sum of 50 per centum of the difference between the wages received at the time of the injury and his earning power thereafter, for the term fixed by the statute.

APPEAL from the district court for Douglas county:
WILLIS G. SEARS, JUDGE. *Affirmed.*

Gurley & Fitch, for appellant.

Fred W. Anheuser and Cornelius F. Connolly, contra.

MORRISSEY, C. J.

This is an appeal from a judgment rendered in the district court for Douglas county in an action brought under chapter 35, Rev. St. 1913, known as the "Employers' Liability Act." As is provided by the statute, the trial was had to the court without the intervention of a jury. The court found generally in favor of the plaintiff; that he was injured while in the employ of the defendant, and is entitled to compensation under the provisions of the act; that plaintiff had been permanently, partially injured in his earning capacity by reason of impaired hearing in his right ear; that the impairment is equivalent to one-fourth of his previous normal hearing; that the plaintiff had suffered total disability for a period beginning September 10, 1915, and ending November 13, 1915; that his earning capacity prior to the time of the injury was \$10.50 a week; that he is entitled to compensation at this rate for the period of his total disability, in the aggregate of \$48.75; found that plaintiff had his earning capacity reduced as a direct result of the accident \$5.50 a week; and that he is entitled to be compensated for permanent, partial disability for the period covered by the statute, which it calculated to be 290 $\frac{5}{7}$ weeks, at the rate of \$2.75 a week, being 50 per cent. of his reduced earning capacity; also that the sum of \$10 be paid to

Dr. E. C. Abbott and \$50 to Dr. T. R. Mullen, to be included in and taxed as costs.

Appellant complains that the judgment is not sustained by sufficient evidence. It is undisputed, however, that plaintiff was in the employ of defendant, and suffered an accident while so employed, and is one of those properly coming within the provisions of the employers' liability act. The complaint as to the sufficiency of the evidence is directed against the extent of the injury sustained, and lack of proof of plaintiff's decreased earning capacity.

As to the extent of the injury, the evidence is so convincing that we do not deem it necessary to set it out in this opinion. While there is some conflict, we think the clear preponderance of the evidence supports plaintiff's contention that his hearing was unimpaired until after he received this blow upon the head, and that it is now impaired to at least the extent found by the trial court. One of the points which is worthy of serious consideration, however, is the failure of the plaintiff to offer proof of the loss of earning capacity by reason of his impaired hearing, and it is said that, without such proof, the court could not enter a judgment for decreased earning capacity for the 290 $\frac{5}{7}$ weeks covered by the judgment. In support of this contention is cited *International Harvester Co. v. Industrial Commission of Wisconsin*, 157 Wis. 167. The Wisconsin statute differs from ours in that it provides compensation for such percentage of the average weekly earnings of the injured employee as represents the impairment of his earning capacity "in the employment in which he was working at the time of the accident," while the statute under consideration does not limit the right of recovery to the difference between earning capacity "in the employment in which he was working at the time of the accident," but allows generally for compensation, whether engaged in the same or a different employment, if that earning capacity be impaired or reduced. At the time of the accident plaintiff was employed in one of the

Stolca v. Swift & Co.

packing houses belonging to defendant. From that date until the trial he had not been employed. It is said in plaintiff's brief, and not controverted, that because of his impaired hearing he could not return to his former employment. It is a matter of common knowledge, of which we think we may take judicial notice, that, other things being equal, a man without physical defects will find employment more readily than a man who is physically unsound. If his ability to obtain employment in any of the great industrial enterprises of the country is impaired, it necessarily follows that he will be compelled to find employment in the less desirable occupations and at a less remunerative wage. It is well settled that prospective damages on account of diminution of earning capacity in the future is a proper element of damage, and proof of previous physical condition and ability to labor before the accident and ability to labor after the accident is deemed sufficient to enable a jury to fix the pecuniary damage. 8 R. C. L. p. 477.

The statute contemplates a trial and judgment soon after the injury, but provides for compensation covering a term of 300 weeks. By its very provisions future loss of earnings must be estimated. If the court cannot take notice of the disability at which plaintiff, who has suffered an impairment of one of his faculties, will be placed, the very end and purpose of the statute will be defeated.

We are dealing with a comparatively new statute designed to cover a field heretofore untouched by the legislature. Consequently there are few adjudicated cases by which we may be guided. In many of the states having acts somewhat similar to our own industrial boards or commissions have been created to administer the law. The purpose seems to be to give speedy and informal hearings, and to avoid, so far as possible, the more technical forms of court procedure. We have not created a board or commission, but this work has been given to the courts. We are constrained to believe, however, that from the terms of the act it may be reasonably inferred that the

Stoica v. Swift & Co.

more formal procedure must give way to a simpler and more direct administration of justice, and that to hold that no recovery can be had for impaired future earnings without positive proof of the diminution of earning capacity would, in effect, nullify the act.

In *Zelinko v. Peabody*, reported in Illinois Industrial Accident Board, No. 304, July 10, 1914, found in a footnote in 5 Negligence and Compensation Cases Annotated, p. 825, the claimant had suffered a broken leg and the fracture was successfully reduced, but in the reduction of the fracture there was a shortening of the limb. The proof shows that the claimant had again resumed manual labor, although in different employment from that in which he was engaged when he received the injury, but there was proof that he had been offered his former position and might have resumed work therein at his former wage. Nevertheless the commission made an award for permanent, partial disability. In a discussion of the subject the commission say: "We are prone to believe that, even though persons familiar with one's usual employment and with the character of an injury may testify that a person so injured is not impaired in his earning capacity, yet it is impossible to conceive how one who was healthy and strong, whose limbs were perfect, having suffered a broken limb and the same being shortened thereby, is not to some extent permanently injured or impaired in his earning capacity." The same reasoning may well apply to the partial loss of hearing, and where, as in this case, the amount awarded is small and well within the terms of the statute, the judgment will be upheld.

Complaint is made of an allowance to Dr. Mullen of \$50 for professional services and witness fees, and of an allowance of \$10 to Dr. Abbott for the same class of service. Under the statute, the employer is liable for reasonable medical and hospital services and medicines, not in excess of \$200 in value, for the first 21 days after the disability begins. There is a dispute as to whether medical services were tendered the plaintiff. The record is indefi-

Robbins v. City of Omaha.

nite and unsatisfactory; but, in any view we take of it, the judgment as to these items cannot be upheld. The injury occurred September 10. The trial began December 1. Dr. Mullen testified that his charge for professional services included his services up to the date of the trial, and it is not shown what he did within the first 21 days, or what he did thereafter. Dr. Abbott made an examination merely that he might qualify himself to testify as to the extent of plaintiff's injury, but does not appear to have rendered any professional service. He is entitled to the fee fixed by statute for a witness, but not for professional service. The judgment as to these two items is set aside, but the clerk in taxing costs will make the proper allowance for witness fees; otherwise the judgment of the district court is

AFFIRMED.

FRANK ROBBINS, ADMINISTRATOR, APPELLANT, v. CITY OF OMAHA, APPELLEE.

FILED DECEMBER 9, 1916. No. 19632.

Municipal Corporations: ACTION FOR INJURIES: PETITION. The substance of the petition is set out in the opinion, and *held* that the demurrer of the defendant thereto was properly sustained.

APPEAL from the district court for Douglas county:
ALEXANDER C. TROUP, JUDGE. *Affirmed.*

John O. Yeiser, for appellant.

John A. Rine, W. C. Lambert and L. J. TePoel, contra.

MORRISSEY, C. J.

Plaintiff, as administrator of the estate of Francis D. Robbins, deceased, filed his petition in the district court for Douglas county, which, omitting the formal parts, alleged: That the city of Omaha is a metropolitan city having a population of more than 100,000; that it has no park commissioners, nor any special parks reserved by the state under any special acts of the legislature, but that

Robbins v. City of Omaha.

all streets, parks and public property are under the supervision of a paid body of men officially called "City Commissioners;" that it is the duty of these commissioners to administer the parks for the use of the city, with regard to the health, life and safety of the citizens of the city; "that said city of Omaha owns a large tract of land, a part of which is known as Elmwood Park, and is improved, and a part of said land is undeveloped for park purposes; that upon a part of the undeveloped portion is a pond artificially constructed, and maintained for profit, in that it operated an hydraulic ram to flush water for toilets and the private use of employees of the city in the park department, and maintained to save corporate expense of constructing water mains; that said pond was not maintained for bathing or for the use of the public in either health or enjoyment, but was withheld from use for bathing or fishing; that said pond was fed by springs of cold water, rendering it unfit for bathers and dangerously inducing cramps; that said pond was over six feet deep, and was negligently maintained at that depth and over by maintaining said dam * * * and by a failure to fill deeper portions; that said city negligently suffered and permitted a raft to be maintained upon said lake for over two weeks before the injury complained of, and negligently permitted and suffered many children to use said raft and pond, knowing of its danger, and never inclosed the said pond; that said deep, cold pond of artificial construction, with said raft, was maintained in an obscure part of said land, without any protection against accidents of children, and without any life-saving devices or means of calling for rescue, as an attractive nuisance, and for no public good, and, further, as a dangerous enticement to children; that said Francis D. Robbins came into said park and went upon said raft on the 20th day of July, 1915, and the caretaker of said city saw said child upon said raft and in a dangerous position, and negligently permitted him to remain in said place of danger, and, while so playing in the dangerous

Robbins v. City of Omaha.

place and situation, fell from said raft into the deep water of said pond at a place of five or six feet deep, causing said Francis D. Robbins to drown." It is further alleged that the deceased was a bright, healthy and intelligent boy, nine years of age, and there is the usual allegation that, by reason of his death, his parents have suffered damages; and there is a prayer for judgment.

To this petition the defendant city demurred, "for the reason that said petition does not state facts sufficient to constitute a cause of action against the defendant." The demurrer was sustained; plaintiff elected to stand on his petition; the cause of action was dismissed, and plaintiff has appealed.

The city claims that, in maintaining this park and pool, it was engaged in a purely governmental service, and that no liability could attach; but we do not deem it essential to a decision of this case to determine that point. The petition alleges that this artificial pond was in a remote part of the park, was out of the usual route of travel, and that it was maintained for profit. But it appears from subsequent allegations of the petition that it was used merely to operate a hydraulic ram to flush water for toilets for the convenience of the employees engaged in the park department. It is clear that it was not maintained for commercial purposes.

It is argued that, because the pond was 6 feet deep, was unguarded, had a raft thereon, and a child might fall therein and be drowned, it is a nuisance, while it is admitted that a shallow body of water which a child might wade across would not be a nuisance. We do not care to fix the depth at which water may be maintained in lakes formed and maintained in public parks. If this is to be done, it ought to be done by legislative enactment. It is a question that falls naturally to the legislative department of the government, and not to the judicial. A lake in a park, whether artificially formed or not, is not of itself a nuisance. Parks are maintained for the benefit of the public, and a pond or lake adds to the beauty of

Robbins v. City of Omaha.

the park and increases its attractiveness. Although this is an artificial body of water, it did not differ in its essential qualities from a natural body of water. The accident which occurred was one that might happen upon a lake formed by nature or upon a river front. This artificial lake, even with the raft thereon, was no more dangerous than the Missouri river front, where boys of all ages congregate. It is common knowledge that boys, even of tender years, indulge in athletic sports. They play upon rafts, boats and floating logs, climb trees, and expose themselves to innumerable dangers. It is part of a boy's nature to indulge in these venturesome sports, and a city can be no more held for negligence in maintaining this artificial pond, unfenced and unguarded, with the raft thereon, than it could for leaving the river front exposed. The possibility of a child being drowned in this pond was as patent to the parents as to the city. The path of the child is always beset with danger, and this pond is one of those dangers to which childhood has ever been exposed. From the facts stated in the petition, it does not appear that the pond and raft constituted an attractive nuisance. The demurrer was properly sustained, and the judgment is

AFFIRMED.

FAWCETT, J., not sitting.

ROSE, J., dissenting.

In my opinion the only ground on which the city can legally escape liability for damages under the facts stated by plaintiff is that it performed a governmental function in maintaining the park. I therefore dissent from the ruling that, without regard to the capacity in which the city exercised its powers, actionable negligence is not pleaded. The child was not a trespasser, but was in the park by invitation, express or implied. If the city is a property owner answerable for negligence, it is governed by the following rule of law:

"The owner or occupier of real property is under the duty of exercising reasonable or ordinary care and pru-

Robbins v. City of Omaha.

dence to the end of keeping his premises safe for the benefit of those who come upon them by his invitation, express or implied; and if, through a neglect of this duty, they are, without negligence or fault of their own, injured by reason of any negligent defect therein, he must pay damages." 1 Thompson, Negligence, sec. 968. *Tucker v. Draper*, 62 Neb. 66.

A child on the premises by invitation is not a trespasser, and it is unnecessary in such a case to show that the pond was an attractive nuisance. *City of Omaha v. Richards*, 49 Neb. 244.

If a city in establishing and maintaining parks does not act in a governmental capacity relieving it from liability for negligence, it is answerable according to the following doctrine:

"The maintenance of a public park in a populous city is not only an implied but an express invitation to the public to resort to it for amusement and recreation, and, where children of tender years and immature minds are invited to play and amuse themselves, the parents have a right to rely on the city to exercise reasonable or ordinary care to keep the park and water-works system safe for the benefit of those who come there by such express invitation."

"The city owed to adults and children alike the duty of exercising ordinary care to avoid injuring them anywhere within the boundaries of the public park, and it cannot escape liability for the death of this child by drawing a distinction between the duties the city owed to the invitees at different points or portions of the park. The view we take of the case is that the city owed to this child and its parents the duty to exercise ordinary care to avoid injuring him, no matter on which portion of the park the child might resort to for play." *City of Anadarko v. Swain*, 42 Okla. 741.

Unless the city was performing a governmental function in maintaining the park, the petition states a cause of action.

DANIEL HOLLAND V. STATE OF NEBRASKA.

FILED DECEMBER 9, 1916. No. 19697.

1. **Information: VERIFICATION: OBJECTIONS.** "It is too late to object to the verification of an information after the accused has been arraigned, and pleaded not guilty, unless such plea has been withdrawn." *Johnson v. State*, 53 Neb. 103.
2. ———: ———. Section 5599, Rev. St. 1913, authorizes a county attorney to appoint deputies to assist him in the discharge of his duties, and a deputy so appointed and qualified may sign a criminal information.
3. ———: ———: **PRESUMPTIONS.** When the right of a person to sign an information as deputy county attorney is questioned for the first time after arraignment and plea, and while a plea of not guilty is still pending, his appointment, qualification and right to sign, in the absence of a showing to the contrary, will be presumed.

ERROR to the district court for Furnas county:
ERNEST B. PERRY, JUDGE. *Affirmed.*

John Stevens, for plaintiff in error.

Willis E. Reed, Attorney General, and *Charles S. Roe*,
contra.

MORRISSEY, C. J.

This is an error proceeding from the district court for Furnas county. The information contained two counts, one charging an assault with intent to inflict great bodily injury, and another charging an assault with intent to kill. From a verdict finding defendant guilty of assault and battery, he prosecutes error.

First, defendant complains that the information differs from the complaint filed before the magistrate at the time of the arrest. As to this it is sufficient to say that the transcript brought to this court contains a copy of the complaint filed before the county judge. It also shows the subsequent filing of what is termed an "amended complaint,"

Holland v. State.

but it nowhere shows that there was ever a preliminary hearing held on either complaint. From the argument we are left to infer that there was a preliminary hearing, but the record is silent on the subject.

After a copy of the information was served on defendant, he filed a motion to quash the information, "for the reason that the same charges a different and more serious offense than was charged in the complaint on which this defendant was arrested." This motion was overruled. Defendant was then arraigned, and entered a plea of not guilty, and by arrangement with the county attorney the trial was continued over the term and defendant admitted to bail. At a subsequent term a jury was impaneled and a witness for the state called and sworn. Without withdrawing his plea of not guilty, the defendant then objected to the introduction of any testimony, and moved the court to enter a discharge: First, because "no information has ever been filed against the defendant herein by the proper prosecuting officer, and no indictment found by a grand jury;" second, that the duly elected, qualified and acting county attorney had not filed and verified the information, and that the information was null and void for that reason. The information is signed "B. F. Butler, County Attorney, by E. J. Lambe, Deputy." The verification and jurat are as follows:

"I, B. F. Butler, do solemnly swear that I am county attorney in and for said county and that allegations and charges in the foregoing information are true as I verily believe. B. F. Butler, by E. J. Lambe.

"Subscribed in my presence and sworn to before me, by the said B. F. Butler, this 8th day of March, 1915. C. A. Modlin, Clerk of the District Court."

These objections were not made before the defendant had entered his plea, nor did he ask leave to withdraw his plea to the information. In *Johnson v. State*, 53 Neb. 103, it is held: "It is too late to object to the verification of an information after the accused has been arraigned, and pleaded not guilty, unless such plea has been withdrawn."

Wunder v. Crane.

It is not material whether the information differs from the complaint filed before the examining magistrate, for the reason that no plea in abatement was filed. If defendant was not given a preliminary hearing on the charges contained in the information, he waived his right thereto when, without filing a plea in abatement, he entered a plea to the information.

It is urged that the information is absolutely void, because not signed by the county attorney in person, and we are cited to *Cubbison v. Beemer*, 81 Neb. 824, which follows an earlier case, holding that an information filed out of the term time is void. Section 5599, Rev. St. 1913, authorizes the county attorney to appoint deputies who may assist him in the discharge of his duties. There is nothing in this record to show that Lambe was appointed such deputy, but when his right to sign the information is questioned for the first time after arraignment and plea, and while a plea of not guilty is still pending, his appointment, qualification and right to act in the absence of a showing to the contrary, will be presumed.

The judgment of the district court is

AFFIRMED.

SEDGWICK and HAMER, JJ., not sitting.

EDWARD A. WUNDER, ADMINISTRATOR, APPELLEE, v. GEORGE F. CRANE ET AL., EXECUTORS, APPELLANTS.

FILED DECEMBER 9, 1916. No. 18955.

1. **Executors and Administrators: TRUST FUNDS: JURISDICTION.** The district court has jurisdiction over executors and others holding a fiduciary relation, and may compel the proper application of trust funds committed to their care.
2. ———: **ACCOUNTING.** Accounting made by the trial court reviewed, found to be sustained by the evidence, and is adopted by this court as a proper finding of the amount due.

Wunder v. Crane.

APPEAL from the district court for Jefferson county:
LEANDER M. PEMBERTON, JUDGE. *Affirmed.*

F. L. Rain and Heasty & Barnes, for appellants.

John C. Hartigan and Edward A. Wunder, contra.

BARNES, J.

This was an action in the district court for Jefferson county by the administrator of the estate of Jeannette Van Orsdol against George F. Crane, sole surviving executor of the estate of W. S. Van Orsdol, deceased, and George F. Crane and George A. Vinton, executors of the estate of Cora Van Orsdol, deceased, to recover three-eighths of the estate of W. S. Van Orsdol. The cause was tried to the court without a jury, and the result of the trial was a judgment for plaintiff and against defendants for the sum of \$4,877.72. The defendants have appealed.

The record shows that on October 31, 1906, W. S. Van Orsdol, a resident of Jefferson county, made a will by which he bequeathed to his daughter Minnie \$3,000, and devised the remainder of his estate to his wife, Cora Van Orsdol. After his will was made, a daughter was born to him, who was named Jeannette, and who was about 17 months old at the time of his death. No provision was made for the daughter Jeannette by will or otherwise. After Van Orsdol's death, his will was probated by the county court of Jefferson county and his estate was distributed by the order of that court. Minnie was paid the \$3,000, bequeathed to her by the will, and the remainder of the estate was turned over to George F. Crane and deceased's wife, Cora, who were the persons named as executors of the will, and was converted to their use. At the time of Van Orsdol's death, his estate consisted of his share as a partner of the firm of Van Orsdol & Crane, and a note for \$3,050, bearing interest at 5 per cent., signed by his partner, Crane. On March 30, 1910, the executors were discharged by the order of the probate court, and on April 18, 1910, the mother of Jeannette died. George F. Crane and George

Wunder v. Crane.

A. Vinton were appointed and qualified as executors of the widow's estate. On August 4, 1913, Edward A. Wunder was appointed and qualified as administrator of the estate of Jeannette, who had died a short time before that date.

It is conceded on all sides that Jeannette's estate was entitled to three-eighths of the estate of her deceased father, but appellants contend that the district court had no jurisdiction in this action against defendants to recover her share of the estate as a trust fund which had been converted under the proceedings above set forth. In *Blake v. Chambers*, 4 Neb. 90, it was held that the district court had jurisdiction over executors and others holding a fiduciary relation, and might compel a proper application of trust funds committed to their care. The same rule was announced in *McGlave v. Fitzgerald*, 67 Neb. 417, *Adams v. Dennis*, 76 Neb. 682, *Coleman v. McGrew*, 71 Neb. 801, and *Prusa v. Everett*, 78 Neb. 250. We therefore hold that the district court had jurisdiction, and appellants' contention on this point cannot be sustained.

It is appellants' second contention that the amount found due plaintiff was excessive, and the evidence was insufficient to sustain the finding and judgment of the trial court. On the other hand, the appellee contends that the recovery was insufficient, and he claims a larger amount. That court made an accounting, which we find in the record, and, after a careful examination of it, we conclude that said accounting was fairly made, and the evidence is sufficient to sustain the judgment.

The judgment of the district court is therefore

AFFIRMED.

ROSE and SEDGWICK, JJ., not sitting.

Sternberger v. Sanitary District.

MORRIS L. STERNBERGER, APPELLEE, v. SANITARY DISTRICT,
APPELLANT.

FILED DECEMBER 9, 1916. No. 19087.

1. **Eminent Domain: CONDEMNATION PROCEEDINGS: PARTIES.** The trial in a condemnation proceeding may be had in the name of the person as plaintiff who owned the land condemned at the time the proceedings were commenced. In such case the court should order the payment of the judgment to the party entitled to the damages.
2. ———: **EXCESSIVE DAMAGES: REMITTITUR.** Evidence examined, and found that the verdict was excessive, and the judgment thereon should be reversed in event the plaintiff fails to file a remittitur.

APPEAL from the district court for Lancaster county:
P. JAMES COSGRAVE, JUDGE. *Affirmed on condition.*

C. J. Campbell and H. R. Ankeny, for appellant.

Morning & Ledwith, contra.

BARNES, J.

This cause was tried in the district court for Lancaster county on an appeal from a judgment of the county court confirming an appraiser's award in a condemnation proceeding.

It appears that Sanitary District No. 1, of Lancaster county, made an application to the county court of that county to condemn a right of way for the construction of a ditch to straighten that part of the channel of Salt creek across the corner of the northeast quarter of section 7, township 10, range 7, in said county. Such proceedings were had that the appraisers found the damages to the land in question amounted to the sum of \$500. Judgment was rendered on the award, and the sanitary district appealed to the district court. On a trial in that court the jury returned a verdict against the district and for the plaintiff for the sum of \$1,585.15. A motion for a new trial was overruled, judgment was returned on the verdict for that sum, and the sanitary district has appealed to this court.

Sternberger v. Sanitary District.

Appellant's first contention is that the appellee was not the real party in interest. It appears without dispute that at the time the condemnation proceedings were commenced one Morris L. Sternberger was the owner of the quarter section of land described in the application; but, before the award was made and judgment was entered in the county court, Sternberger sold the quarter section, together with other adjoining lands, which comprised 310 acres, to P. J. Turner and A. O. Corbin. Turner and Corbin divided the entire tract so that Corbin became the owner of the quarter section across which the ditch was constructed, and by agreement was entitled to damages awarded. It also appears from the evidence that neither Sternberger nor Turner had any interest in the award. Therefore Corbin might have been substituted as plaintiff in place of Sternberger, and the proceedings might have been conducted in his name; but that fact is not decisive of the question here, for it was not error to continue the trial in Sternberger's name for the benefit of the person entitled to the damages.

It is appellant's second contention that the verdict of the jury was excessive and is not sustained by the evidence. The record discloses that the cause was tried on the theory that the whole tract of 310 acres was damaged by the construction of the ditch. The witnesses for the plaintiff all testified that the whole 310 acres of land was worth \$125 an acre before the ditch was constructed, and that after the construction it was worth only \$118 an acre, thus fixing the damages at \$2,170. This testimony, as a whole, was entitled to little consideration. The record shows that the plaintiff's witnesses gave their evidence with such perfect agreement that it should be carefully scrutinized by the court, and was not entitled to adoption as the true measure of damages. The record also shows that only 80 acres of the tract of land described in the application was damaged by the construction of the ditch, and it may be fairly said from the testimony that not more than 40 acres of it were damaged by such construction. The record shows that the ditch was about

Sternberger v. Sanitary District.

1,200 feet long and there were only 3.3 acres of land taken for its construction. It cut off about 23 acres from the main body of the farm, and the land cut off is accessible by a public road located on two sides. There is considerable competent evidence in the record tending to show that the land through which the ditch was constructed was low and wet, and some of it was covered with trees and brush; that there were several lakes and ponds situated thereon which had no outlet, and the construction of the ditch afforded drainage for such ponds. There is also some evidence in the record tending to show that the construction of the ditch was a benefit to the tract of land across which it was constructed. We therefore conclude that the verdict was excessive and is not sustained by competent evidence. The evidence fails to sustain damages in excess of the amount found by the appraisers.

Errors are assigned for the giving of instructions: First, that the court erred in not limiting the damages to the 80 acres across which the ditch was dug; and, second, that the court erred in not instructing the jury on the law relating to general and special benefits. An instruction should have been given restricting the damages to the land described in the application, and the jury should also have been instructed as to the law relating to benefits. A jury of laymen should not be expected to make correct findings on those questions without proper instructions. We therefore conclude that the judgment complained of should be reversed, and this will be done unless the plaintiff shall, within 30 days, remit all of said judgment except \$500 and interest on the same from the date of the award in the county court. It is further ordered that the sanitary district shall pay all the costs in the district court, and recover costs in this court.

JUDGMENT ACCORDINGLY.

SEDGWICK, J. I think the damages are excessive and there should be a remittitur, but the amount of the remittitur should be definitely ascertained and determined.

Shapiro v. Omaha & C. B. Street R. Co.

JACOB SHAPIRO, ADMINISTRATOR, APPELLANT, v. OMAHA &
COUNCIL BLUFFS STREET RAILWAY COMPANY, APPEL-
LEE.

FILED DECEMBER 9, 1916. No. 19122.

1. **Appeal: CONFLICTING EVIDENCE.** Where the evidence is conflicting, a verdict will not be set aside by a reviewing court unless it is manifestly wrong.
2. **Trial: HARMLESS ERROR: INSTRUCTIONS.** Ordinarily it is not reversible error to copy the pleadings in an instruction, if by other instructions the issues as to the particular acts of negligence relied upon are properly and concisely stated and submitted to the jury.
3. **Street Railways: INJURY TO PEDESTRIAN: LIABILITY.** Where a motorman in charge of a street car operated by electricity is suddenly confronted by an emergency which requires him to stop his car or lower the fender, if, in such emergency, his best judgment prompts him to stop the car, instead of attempting to lower the fender, and he uses suitable and the best approved means which are at his command for that purpose, neither he nor his employer are guilty of negligence, as a matter of law.

APPEAL from the district court for Douglas county:
CHARLES LESLIE, JUDGE. *Affirmed.*

Weaver & Giller, for appellant.

John L. Webster and William R. King, contra.

BARNES, J.

This action was brought by Jacob Shapiro, as administrator of the estate of his deceased minor son, Leon Shapiro, against the Omaha & Council Bluffs Street Railway Company for negligently causing the death of decedent, who was killed when attempting to cross the defendant's tracks in front of a moving car.

The allegations of negligence set forth in plaintiff's petition were, in substance, as follows: The death of Leon Shapiro was caused by the negligence and failure of the motorman in charge of defendant's street car to stop his

Shapiro v. Omaha & C. B. Street R. Co.

car before it reached the decedent, and, when said car struck the deceased, he was thrown on the fender of the car, and the motorman negligently and carelessly failed to stop the car while he was on said fender; that the motorman in charge of the car negligently and carelessly failed to stop his car after the child rolled off in front of the fender and before he was run over and killed; and that the motorman negligently failed to lower the fender and prevent the accident.

Defendant's answer admitted that the deceased, Leon Shapiro, attempted to cross one of defendant's street car tracks south of Paul street, and on Twentieth street, in the city of Omaha. He was passing in front of a car going north on the east track of said defendant's street railway, and, with reference to his doing so, defendant alleged that deceased's attempt to cross the track in front of said car was so sudden and quick that the motorman in charge of said car was unable, although he exercised the utmost diligence in that behalf, to stop the car before said Leon Shapiro stepped in front of the same. Defendant further answering plaintiff's petition, and especially with reference to the third paragraph thereof, admitted that, when said Leon Shapiro started to run across said tracks, the car was running at a moderate rate of speed, about eight or ten miles an hour, the said speed being not only moderate, but, as defendant alleged, the usual rate of speed said car was run at or near said place. Defendant expressly denied all allegations and statements contained in the petition, and further denied the statement in paragraph 3 except as above admitted to be true. Plaintiff's reply was a general denial of the allegations of the answer.

On the issues thus presented, the case was tried to a jury in the district court for Douglas county. Defendant had the verdict and judgment, and the plaintiff has appealed.

Appellant's first contention is that the evidence was not sufficient to support the verdict. The record discloses that on the 22d day of August, 1912, plaintiff's decedent, a boy about three years of age, was run over and killed by one of

defendant's street cars which was being operated on north Twentieth street. The accident occurred between Nicholas and Paul streets, at a point where defendant's track was nearly level. The car which ran over the boy was a north-bound car running at about eight or ten miles an hour. The testimony shows that, about 3 or 4 o'clock in the afternoon of the day of the accident, the decedent, with several other children, was playing on the street along the east curb of Twentieth street, and, when the approaching car was at considerable distance away, all the children, except the boy Leon, ran across the street from the east to the west curb; that Leon remained on the east side of the street somewhere between the curb and the street car tracks; that, as the car approached him, and when it was about a length and a half away from him, he suddenly started to cross the tracks and ran in front of the car, with the result that he was knocked down, run over, and killed. So far there was no conflict in the evidence. There is not much conflict in the testimony as to the point where the child started to cross the street, but the evidence is somewhat conflicting as to the distance the car ran after the child started to cross the track and the place where it was stopped. There was also some conflict in the evidence as to whether the motorman was negligent in failing to stop his car. This was not a direct conflict, for the motorman testified that, as soon as he saw the child was going to cross the track, he sounded the gong and made every possible effort to stop the car as quickly as possible. His evidence was corroborated by the testimony of others who saw the accident, and by a disinterested eyewitness, who testified that when the boy ran in front of the car it was within three feet of him, and was further corroborated by the testimony of experts in the management of street cars. One of plaintiff's witnesses who saw the accident testified that the stop made was as good as could have been made considering the speed at which the car was running. There was no direct evidence to the contrary, but certain witnesses for the plaintiff gave their opinion as to the distance in which a car could be stopped under the cir-

circumstances existing at the time of the accident. As we view the record, the evidence quite conclusively establishes the fact that the car, which was a short one operated by hand brakes, was stopped within from 15 to 25 feet after it struck the child. Appellant strenuously contends that the child was struck and fell upon the fender of the car, and it was claimed that the motorman was negligent in failing to lower the fender. On this point there was a direct conflict in the evidence. The preponderance seems to favor the defendant's contention that the child did not fall upon the fender, but was knocked down by the fender and immediately rolled under it. The motorman testified that he did not have time to drop the fender because he was exercising all his energy and making every effort he could to stop the car. With this conflict in the evidence, it cannot be said that it does not sustain the verdict.

Appellant's next assignment of error which requires consideration is that the trial court erred by copying the pleadings in his instructions. We have often had occasion to condemn this practice; but, in reading the instructions in the instant case, it appears that the court by instructions numbered 5 and 6 correctly and concisely submitted to the jury the particular allegations of negligence of which the plaintiff complained. In view of this fact, the judgment should not be reversed. Other instructions are assigned as error, but, without making particular reference to them, we are satisfied that the case was fairly tried and correctly submitted to the jury.

Finally, it is contended that, by failing to lower the fender of the car, the motorman was guilty of such negligence as entitles the plaintiff, as a matter of law, to a judgment. Where the motorman in operating a street car moved by electricity is confronted with a sudden emergency which requires him to attempt to stop his car or lower the fender, if in such emergency he exercises reasonable care and adopts well known and approved methods of stopping his car, instead of dropping the fender, he cannot be said to be guilty of negligence, as a matter of law, and this rule

Stephenson v. Germania Fire Ins. Co.

should be applied where the evidence tends to show that he had insufficient time to lower the fender, and that, if it had been lowered, the injury could not have been prevented.

The evidence sustains the verdict, and the judgment of the district court is

AFFIRMED.

GEORGE T. STEPHENSON, APPELLANT, v. GERMANIA FIRE
INSURANCE COMPANY, APPELLEE.

FILED DECEMBER 9, 1916. No. 18704.

1. **Insurance: POLICY: NATURE OF CONTRACT.** An insurance policy is a contract between the insurer and the insured, and neither party can make a new contract for the other without his knowledge or consent.
2. ———: ———: **ASSIGNMENT.** The owner of a policy of insurance, who has parted with the title to the premises, cannot assign the policy, after a fire, and without the knowledge and consent of the insurance company which issued the policy, so as to make it liable to a third person for the loss.
3. ———: ———: **STATUTORY PROVISIONS.** The provisions of section 3187, Rev. St. 1913, do not apply to a case where the insurance company has never entered into contractual relations with the person claiming under the policy.

APPEAL from the district court for Gage county:
LEANDER M. PEMBERTON, JUDGE. *Affirmed.*

E. N. Kauffman, for appellant.

J. L. Caldwell, contra.

LETTON, J.

Action to recover upon a fire insurance policy. A general demurrer to the answer was overruled. Plaintiff elected to stand on his demurrer, and judgment of dismissal was rendered. Plaintiff appeals.

Stephenson v. Germania Fire Ins. Co.

The petition alleged, in substance, that the insured property was owned by one W. M. Rice; that about the 1st of August, 1913, the plaintiff commenced negotiations by mail with Rice who lived in Pueblo, Colorado, to purchase the property, and soon thereafter completed a contract of purchase. As a part of the consideration, Rice agreed to assign and deliver to him the policy of insurance. The deed and policy were sent to a bank at Wymore for delivery to plaintiff, but Rice failed to assign it in writing. Before the plaintiff could procure a written assignment, on the 31st day of August, a fire occurred which almost wholly destroyed the building. After the fire, Rice sent the plaintiff an assignment in writing. It is also alleged that the property was damaged more than the indemnity provided for, and that no additional hazard was caused by the transfer of the property.

The defendant's answer, in addition to certain admissions and denials, pleads (1) a provision of the policy that, if a change took place in the title or interest of the assured in the property, the policy should be void, and the fact that the title to the property had passed from Rice before the fire; (2) a provision of the policy that it should be void if assigned without the written consent of the insurance company indorsed thereon, and the fact that the attempted assignment was made after the fire and without its consent; (3) that it never entered into a contract with the plaintiff or knew he claimed any interest in the property until after the fire; (4) that he is not the owner of the policy and the defendant company has never recognized him as such.

The general demurrer searched the record. The pleadings disclose that, after the title had passed from Rice and after a fire had practically destroyed the insured property, he undertook to assign the policy to plaintiff without defendant's consent or approval. At this time defendant knew nothing about the change of title and had not consented to enter into an insurance contract with the plaintiff. By the terms of the policy the change of ownership avoided the contract. This is a reasonable provision for

Stephenson v. Germania Fire Ins. Co.

the protection of the insurer. An insurance company has the right to determine with whom it shall contract, and while in the great majority of instances its consent to an assignment may be, as plaintiff insists, merely a matter of course, it is so because of the fact that there is ordinarily no moral hazard, and therefore it is willing to enter into a contract. Instances do occur occasionally when insurance companies decline to enter into insurance contracts with individuals. This is their right and privilege, and it is not unreasonable that they reserve to themselves by their policy the right to determine with whom they will contract.

Plaintiff virtually concedes that this is the law, but insists that by the enactment of the new insurance code the law has been changed so as to allow the recovery. He relies upon the following language in section 3187, Rev. St. 1913: "The breach of a warranty or condition in any contract or policy of insurance shall not avoid the policy nor avail the insurer to avoid liability unless such breach shall exist at the time of the loss and contribute to the loss, anything in the policy or contract of insurance to the contrary notwithstanding." At the time the contract was entered into with Rice no such provision was in the statutes; but, even if such a provision were in force, how can it apply to the facts pleaded? It is the entire absence of a contract relation between the plaintiff and defendant that is relied on as a defense. Plaintiff never owned a policy issued by the defendant, and hence the defendant is not an insurer of his property, and never has been. *Farmers Mutual Ins. Co. v. Home Fire Ins. Co.*, 54 Neb. 740.

The petition shows that the policy would expire in about nineteen days after the fire. The plaintiff, who, it was said at the argument, is a man experienced as an insurance agent, accepted the title to the property when the policy which accompanied the deed expressly stated the necessity of the consent of the insurer to an assignment in writing in order to transfer the insurance. He could have declined to take title until the insurance was transferred, or he could

have taken out new insurance, since the policy had such a short time to run; but, instead of following the safe course, he took the risk of a fire occurring in the interval of time it would take to again communicate with Rice. There is no privity between him and the defendant, and they have never had any contractual relations.

Moreover, a contract requires the meeting of minds. In *New England Loan & Trust Co. v. Kenneally*, 38 Neb. 895, it is said: "The general rule of law is, that a policy of fire insurance is a personal contract with the party insured and does not run with the land or pass to the purchasers by a sale of the premises or property insured, and any assignment of the policy *must be with the knowledge and consent of the insurer*. *Ayres v. Hartford Fire Ins. Co.*, 17 Ia. 183, and cases cited; *Simeral v. Dubuque Mutual Fire Ins. Co.*, 18 Ia. 319; *Ætna Fire Ins. Co. v. Tyler*, 30 Am. Dec. (N. Y.) 90; May, Insurance, sec. 6." Each party has the right to determine for himself whether he will do business with the other. In the case of an attempted assignment of a policy of insurance, there is no new contract until the insurer knowingly accepts the assignee in the place of the former as the person with whom it insured. The insurance company would have the same right to insist that an assignee of the policy, without his consent to and acceptance of the assignment, would become liable for any unpaid premiums, as an assignee, without the insurer's knowledge or consent, has to insist upon payment of a loss.

There was no forfeiture as defendant insists. Rice had the right to surrender his policy at any time, receiving back the unearned premium at the customary short rates. When he parted with the title, he had no insurable interest left, and there was nothing to forfeit.

Plaintiff contends that there is a saving clause in the new statute which in some way aids his contention. This clause, however, merely provides: "All actions and proceedings which may be pending in any court under existing laws which this act in any way supersedes or repeals shall proceed without being in any manner affected by the passage

Stephenson v. Germania Fire Ins. Co.

of this act." Rev. St. 1913, sec. 3321. This action was not pending when the insurance code took effect, and the saving clause has no application.

The judgment of the district court is

AFFIRMED.

HAMER, J., not sitting.

SEDGWICK, J., dissenting.

The insured agreed to convey this property to the plaintiff and assign the insurance policy. He afterwards executed the deed, but there was some delay in assigning the policy, and before a formal assignment had been made the building burned. The policy provided that it should be void "if any change took place in the title, possession or interest of the assured, * * * unless otherwise provided by agreement indorsed thereon." There was a blank form on the policy for assignment and consent of the company, but the insurance company had not executed it. The question is whether the policy was void under this condition. It clearly did not avoid the policy under the present statute: "The breach of a warranty or condition in any contract or policy of insurance shall not avoid the policy nor avail the insurer to avoid liability unless such breach shall exist at the time of the loss and contribute to the loss, anything in the policy or contract of insurance to the contrary notwithstanding." Rev. St. 1913, sec. 3187. The majority hold that this section does not apply, because this policy was issued before this statute was enacted. That may be doubtful, but it does not seem to be material, because we had decided the same thing long before this policy was issued. "A contract of insurance, where the insurer has received and retains the consideration, is to be sustained, if possible and should not be defeated upon any ground which does not materially increase the risk." *Billings v. German Ins. Co.*, 34 Neb. 502. For the same principle the following cases are cited in the brief: *Phoenix Ins. Co. v. Barnd*, 16 Neb. 89; *State Ins. Co. v. Schreck*, 27 Neb. 527; *Farmers & Merchants Ins. Co. v. Newman*, 58 Neb. 504;

Stephenson v. Germania Fire Ins. Co.

Hanover Fire Ins. Co. v. Gustin, 40 Neb. 828. "It should not be defeated upon any ground which does not materially increase the risk." This conveyance did not materially increase the risk, since the residence was occupied by a tenant a long time before the conveyance was made, and the same tenant continued to occupy after the conveyance was made and until the house burned. There was no change in the occupancy and no possible increase in the risk. We are not alone in this holding. "Under a provision in a fire insurance policy that it shall be void if the risk is increased in any manner, or if the property is sold or any change is made in the title, or if the property is incumbered or used for other purposes without consent, a change of title, incumbrance or use will not render the policy void unless it increases the risk or decreases the security." *Russell v. Cedar Rapids Ins. Co.* (78 Ia. 216) 4 L. R. A. 538, and note. This seems to be the general rule without a statute.

The majority opinion says: "Moreover, a contract requires the meeting of minds." If this statement has any force in this case, it must mean that one party to a contract cannot assign his interest therein so as to give his assignee any interest in the contract without the consent of the other party. This is announcing a great change in the law of contracts, and, if adhered to, will disorganize business as at present carried on. If I contract to convey my house and lot to A, and he assigns that contract to B, I cannot refuse to recognize the right of B to a conveyance. The contract becomes one between myself and B, whether I do or do not consent. In the case at bar, Rice could sell his property to Stephenson, including his interest in the insurance, and the contract of sale included the transfer of the insurance policy. As there was to be no change of occupancy of the property, or any other possible increase of hazard, the parties were justified in assuming that the company would consent to the assignment of the policy. The purchaser could not be compelled to take the property under their contract unless an assignment of the policy could be made. There was no attempt on the part of the company to show any reason for

Davison v. Chicago & N. W. R. Co.

objecting to a transfer of the policy or that consent would have been refused, except as a pretext for avoiding payment of a meritorious claim. The contract of insurance contemplates that the interest of the insured is assignable, and the company's consent is formal, unless some reason, contemplated by the contract exists for refusal.

The general rule that a sale and transfer of the property without the due assignment of the policy will avoid the policy does not apply in this case.

JOSEPH H. DAVISON, APPELLEE, v. CHICAGO & NORTHWESTERN RAILWAY COMPANY, APPELLANT.

STEVEN E. DEXTER, APPELLEE, v. CHICAGO & NORTHWESTERN RAILWAY COMPANY, APPELLANT.

RAY H. MCCORMICK, APPELLEE, v. CHICAGO & NORTHWESTERN RAILWAY COMPANY, APPELLANT.

FILED DECEMBER 9, 1916. Nos. 18946, 18947, 18948.

1. **Statutes: VALIDITY: FORMER ADJUDICATION.** A statute may be upheld as against an attack made by one party claiming it to be invalid upon one ground, and still it may be declared unconstitutional in a later attack by another litigant for reasons not called to the attention of the court, or not shown to exist, in the first case.
2. ———: ———: **TRANSPORTATION OF LIVE STOCK.** A statute or order regulating the rate of speed of the carriage of live stock is a proper exercise of the police power of the state, but such a statute or order must be reasonable, and practical in its operation, and it must not impose an undue burden upon the carrier, nor take away any of its constitutional rights.
3. ———: ———: ———. Where the undisputed evidence shows that for the greater portion of the year defendant, which operates a single-track railroad in Nebraska and other states, with several branch lines in this state, cannot comply with the speed law (Rev. St. 1913, secs. 6018, 6019) as to west-bound shipments of live stock

Davison v. Chicago & N. W. R. Co.

without sending out special trains on branch lines to transport from one to four or five cars, and at a cost of double the rates allowed to be charged, and it is further shown that on account of the ordinary incidents and vicissitudes of operation of a long single-track railroad, such as making up and inspection of trains at division points, waiting to meet mail, passenger and other trains, waiting for stock from branch lines, and those delays occurring by reason of storms, washouts, wrecks and other unforeseen and unavoidable casualties, it is often impracticable to come within the statutory limit with east-bound traffic, and the statute permits of no defense by reason of any of such conditions, such a statute is an unreasonable exercise of the police power of the state and violates the constitutional rights of the defendant.

APPEALS from the district court for Brown, Holt and Dawes counties: ROBERT R. DICKSON and WILLIAM H. WESTOVER, JUDGES. *Reversed.*

A. A. McLaughlin, Wymer Dressler and Lyle Hubbard, for appellant.

A. W. Scattergood, M. F. Harrington, Hugh J. Boyle, W. K. Hodgkin and Earl McDowell, contra.

LETTON, J.

These actions are brought to recover liquidated damages from a common carrier for failure to comply with the terms of the "speed law." Rev. St. 1913, secs. 6018, 6019. In the *Davison* case, which is to recover for delay in shipment of stock east-bound from Ainsworth to South Omaha, a jury was waived, the cause tried to the court, findings made, and a judgment rendered for the plaintiff for \$935. The shipment in the *McCormick* case was of one car of cattle west-bound from South Omaha to Andrews, a distance of 469 miles. A verdict of \$170 was directed. In the *Dexter* case delay was complained of in transporting three cars of cattle west-bound from south Omaha to O'Neill. A verdict was directed for \$545. Defendant appeals in each case. The three causes were submitted together in this court and are illustrative of different conditions.

The petition in the *Davison* case contains 15 separate causes of action which are substantially alike. In sub-

stance, the first cause of action alleged is that on the 9th day of January, 1912, plaintiff delivered to defendant for shipment from Ainsworth to South Omaha a car-load of hogs; that the defendant unlawfully and negligently used 24 hours in transporting the hogs to South Omaha, when no more than 15 hours should have been taken, and thereby it became indebted to plaintiff at the rate of \$10 an hour for 9 hours. The remaining causes of action cover like shipments upon different dates.

The answer alleges that the shipments were forwarded with due and proper dispatch. It also pleads that each shipment was necessarily delayed for the purpose of taking coal and water for the locomotive, for meeting west-bound trains, and permitting passenger trains going in the same direction to pass, for setting out and picking up empty cars and dead freight for stations through which the trains passed, for the purpose of inspecting, making up and rearranging trains at division and junction points, and for other purposes necessarily incident to the operation of trains; that a portion of the delay was occasioned by hot boxes and by extremely cold weather and storms, and that all were necessary in the operation of its railroad and for the service of the communities dependent upon it for railroad transportation.

It is further pleaded that defendant's road is a single-track railroad, part of a system extending into and through eight other states; that it was engaged in transporting both interstate and intrastate traffic from Ainsworth to South Omaha, carrying United States mail and passenger trains in both directions, and carrying live stock as interstate commerce from points in South Dakota and Wyoming to South Omaha and Sioux City and Chicago; that it is and was impossible to so operate its railroad as to move the stock shipments at the statutory speed without unreasonable interference and delay to west-bound interstate commerce and United States mail, and without giving preference to intrastate shipments of live stock east-bound; that the live stock offered in this state for trans-

portation to South Omaha is insufficient in quantity to enable it to run special trains therefor without great loss; that shipments of live stock from South Omaha to points on the various branches of defendant's lines in the state of Nebraska average less than five car-loads a day, and on many days no car-loads are offered for shipment; that the greater portion of the year only one or two car-loads are offered in any one day for such shipments, except during the months of September, October and November, when there is a general movement of stock cattle from South Omaha to the feeding yards along the line; that, after a train with such car-loads of live stock reaches Fremont, it is often necessary to divide it and send part of the live stock in small shipments over its branches; and that, in order to comply with the statutes, it will be necessary to run high-speed special trains to move small quantities of live stock, and thus give such trains a preference over freight from other states, thus interfering with interstate commerce. It is also alleged that numerous cities, towns and villages through which the train passes have enacted speed ordinances limiting the speed of trains, with which it is compelled to comply, and that, in order to comply with the statute, it will be required to move trains between stations at a dangerous rate of speed; that to transport live stock at the rate of speed required will involve an expense greatly in excess of the rate defendant is permitted to charge, and in excess of the amount the shipper can afford to pay and that the traffic will bear; that the enforcement of the statute would deprive it of its property without due process of law, and without just compensation, and would deny to defendant the equal protection of the laws, in violation of the Fourteenth amendment to the Constitution of the United States, and of the Constitution of the state of Nebraska. The reply was practically a general denial.

The findings of the court in the *Davison* case, on the first cause of action, summarized are: That the time necessarily consumed in setting out, loading and picking up

live stock was 15 minutes; in waiting for and meeting trains carrying United States mails, 1 hour and 36 minutes; in waiting for and meeting trains carrying interstate commerce 43 minutes; in taking coal and water, 1 hour and 59 minutes; in inspecting trains at division points for defects in safety appliances, 1 hour; in breaking up trains at division points, making up trains to go forward afterward, and waiting for stock from branch lines and from trains following, 40 minutes. The court refused to deduct any of the time of these delays, and found there was due on the first cause of action, at the statutory rate, \$60 with 7 per cent. interest to date. Equally detailed findings were made for each of the other causes of action. The court further found that defendant's railroad in the state of Nebraska is, and was at the time complained of, a single-track railroad; that defendant is engaged in both interstate and intrastate commerce; that its system of railroads extends to and through the states of Illinois, Wisconsin, Michigan, Minnesota, Iowa, North Dakota, South Dakota, Nebraska and Wyoming; that the defendant now operates a sufficient number of west-bound trains on its railroad, including its main line and its branches in the state of Nebraska, and at a sufficient rate of speed, to adequately serve all communities on its said lines in Nebraska in the transporting of all kinds of inanimate freight; that, in order to transport live stock in a westerly direction from South Omaha to stations on the defendant's main line and branches in the state of Nebraska at the average rate of speed required by sections 6018, 6019, Rev. St. 1913, special trains must be operated, in addition to trains required for transporting other kinds of freight in each instance when live stock is tendered for transportation; that, except during a small portion of the year, the defendant could transport all live stock offered to it for transportation from South Omaha to stations on its line, in its trains regularly operated for the transporting of inanimate freight, if permitted to transport live stock at the rate of speed at which such regular trains can be operated; that de-

defendant is offered about 1,600 or 1,700 car-loads of live stock yearly at South Omaha for transportation to the various stations on its lines in Nebraska, and except during the months of August, September and October, when feeders are being moved from South Omaha to the feeding yards on defendant's lines, it rarely happens that more than three or four cars are offered to it for transportation on any one day; that South Omaha is the principal market for live stock shipped from stations on defendant's line of railroad in the state of Nebraska, and that substantially all the live stock offered to defendant for transportation in the state of Nebraska is destined either to South Omaha, or same is shipped from South Omaha to stations along defendant's line; that, in cases where more than one car of live stock is offered for transportation from South Omaha over defendant's line of railroad, the destination of such live stock may be such as to require a special train for each car-load before same reaches destination on account of destination of the various cars being on the various branch lines of defendant operated in the state of Nebraska. The court found that, in order to comply with the statute, special trains for live stock will be required to be operated at times in excess of those otherwise required, without decreasing the number of trains necessary for transporting other kinds of freight, including freight moving as interstate commerce.

The court refused to make the following findings requested by defendant: That a compliance with the speed statute would require the abandonment of safety precautions in the operation of its trains, and would tend to promote unsafe methods of operation, danger to the general public, and the violation of the speed ordinances, and would cause loss and damage to freight, passengers and employees; that the time necessarily consumed in waiting for and meeting passenger trains carrying United States mail, in meeting trains carrying interstate commerce, in taking coal and water, in inspecting trains at division points for defects in safety appliances, and in

breaking up trains, and making them up, and in waiting for stock from branch lines or in a train following at such points should be excluded; that the cost of transporting live stock in compliance with the statute would be grossly in excess of the revenue derived therefrom under present tariffs, and in excess of the amount that shippers can afford to pay, and that its collection of a compensatory rate would destroy traffic in live stock to and from South Omaha; and that the statute is unconstitutional as an unreasonable exercise of the police power, or for any other reason.

The affirmative findings of fact made by the trial court are supported by the evidence, and their correctness is not disputed by either party. The train sheets covering the cars of stock offered for shipment and actually shipped westward from South Omaha during the year 1910 are in evidence in the *Davison* case, and from these, together with the testimony of the train dispatcher, it is shown that 1,616 cars were shipped west, mostly to Nebraska points; that there were four days in January when only one car of live stock was offered for shipment west, two days when two cars were offered, two days when three, two days when four, two days when five, two days when seven, one day when eight, and one day when nine cars were shipped, being 63 cars in January. In February there was an average of a little over two cars a day for 15 days; in March about five cars a day for 23 days were offered. In September, October, November, and December the number of shipments was largely increased; but, even then, on only 9 days in the year did the number of cars offered exceed 20. Even where the number of cars was sufficient to make up a complete train, in most instances it could only run a short distance before being broken up, and the cars distributed to the Lincoln branch, the Superior branch, Hastings branch, Albion branch, or other branch lines. In the *Dexter* case it is shown that, in 1913, 1,591 cars of stock were shipped westward to Nebraska points and that for the years 1911 and 1912 the

Davison v. Chicago & N. W. R. Co.

traffic was about the same. For about eight or nine months of the year cars of stock which are offered for shipment at South Omaha to points in Nebraska are so inconsiderable in number that they cannot be moved within the time limited, except in special trains and at an excessive expense. Such cars on branch lines are placed in regular local freight trains which run according to a time table, and are scheduled so as to allow time for the delivery of local freight and merchandise at each station. This of itself makes the time consumed exceed the statutory limit.

It is also established that on account of unforeseen accidents and delays that sometimes happen to the train in which stock is shipped or to other trains which it is scheduled to meet, by reason of unavoidable delays incident to the business, such as wrecks, washouts, storms, cold weather, hot boxes, and the like, it is often impossible to move shipments of live stock east-bound within the limit. The time consumed on a single-track railroad in waiting at stations in order to meet mail and other trains, in taking coal and water, and time consumed at division and junction points, in inspection for defects in car appliances, and in breaking up the train and incorporating other cars brought from branch lines, are necessarily incident to the operation of the railroad. A number of these elements increases the delay with an increase in traffic on the road. It is also evident that, as the distance to South Omaha becomes less, the difficulties in transportation become greater on account of the congestion of traffic brought to the main line from branches. The testimony of the general superintendents in Nebraska of the defendant, and of the Chicago, Burlington & Quincy Railroad Company, and Union Pacific Railroad Company, and others concerned with the operation of trains, is substantially to the effect that, while it would be possible to comply with the statute, in many instances special trains would be required for a few cars, undue preference would require to be given to such traffic over other trains, the expense of operation would be so greatly increased that, in

Davison v. Chicago & N. W. R. Co.

order to cover the cost, tariff rates would require to be made double what they now are, and the rates be made prohibitive, and other trains and interstate business would be interfered with and delayed.

Defendant insists that if time necessarily occupied in taking coal and water, in taking side tracks to allow meeting and passing trains, in delays at division stations for inspection and rearranging cars, and those caused by severe storms, washouts, excessive cold weather, unforeseen and unavoidable accidents, and the like, could be added to the exceptions in the statute, its terms might be complied with. It insists that the time consumed in such necessary operations must of reason be exempted from the provisions of the statute—citing *United States v. Kirby*, 7 Wall. (U. S.) 482, which is to the effect that, although a statute providing a penalty for interference with the transmission of mails did not contain an exception, yet an officer might lawfully arrest a mail carrier upon a warrant charging him with the crime of murder, even though it operated to cause delay. Other cases are cited in this contention which are mentioned in the opinion in *Cram v. Chicago, B. & Q. R. Co.*, 84 Neb. 607, a case involving the validity of the same statute. The trouble is that to write so many exceptions into the statute would be judicial legislation. We held in the *Cram* case that the common-law exemption of common carriers from liability for loss occasioned by the act of God or the public enemy may be presumed to have been in the legislative mind, and therefore the court may properly allow them to be made, though not expressed in the text; but this is as far as we find warrant to go.

Plaintiff insists that the constitutionality of the law was fully considered and definitely upheld in the *Cram* case, and that the question cannot be relitigated. But the main question in this case was not then presented or in issue. But little testimony was offered, and no concrete facts were presented to demonstrate that a speed of 14 or 18 miles an hour was unreasonable or impracticable. That

case was determined, as to the practicability of operation of trains within the prescribed limit, on an *a priori* basis. In the opinion it is said: "The statute does not deny the carrier the right to defend an action brought thereon, nor state what, if any, defenses may or may not be available in such a case. Defendant will not be in position to complain in this particular until, in a concrete case, wherein it has presented and maintained or offered to maintain a legitimate defense, the courts have determined that the statute denies the carrier that right."

We are now presented with concrete cases in which defense was attempted by showing that a large portion of the time occupied by delay in transit was absolutely necessary in the proper and lawful operation of the railroad. The district court, however, determined that the statute denied the carrier the right to make such defense, or rather refused to hold that the statute permitted such a defense to be made, and, hence, a new question is presented here not determined in the former case. A statute may be upheld as against an attack made by one party claiming it to be invalid upon one ground, and still it may be declared unconstitutional in a later attack by another litigant for reasons not called to the attention of the court, or not shown to exist, on the first attack. The facts here in evidence were not adduced in the *Cram* case. It may be that on account of the difference in the character and equipment of the two railroads, the weight of metal in the rails, or amount of ballast on the track, the nature of the localities through which their lines run, the different facilities for operation, etc., such a defense could not have been made by the defendant in that case. At all events no such showing was made. There was evidence in the *Cram* case showing, as a general proposition, that in the management of traffic the defendant was compelled to side track trains containing live stock and wait for passing trains; but there was no specific evidence applying to the particular shipments in controversy, nor as to other matters for which it is now asserted deductions of time should be allowed, nor as to the

Davison v. Chicago & N. W. R. Co.

need of special trains if the statute was to be complied with. The questions at issue here were not presented, and it was held that it was unnecessary to consider whether facts not in evidence might constitute a defense.

A difficult question in the case is whether, if the defendant complies with the statute strictly, incurring very large expense for special trains, and making the cost of intrastate transportation of live stock westward, if carried on at the present rates, unremunerative, a sufficient remedy is furnished by the fact that it may apply to the state railway commission for an increase of rates, or whether it is the duty of the court, considering the impracticability of operation of such trains in many cases, the lack of qualification or excuses in the statute for unavoidable delays, and the additional expense which the operation of such trains at the statutory rate of speed must entail, to declare that such a statute is an unreasonable exercise of the police power, and therefore void. The extra expense of carrying on the west-bound traffic within the time limit is not necessarily the determining factor.

The case does not involve a consideration of the whole scheme of rates for the carrying of freight, but merely whether an order by the legislature to perform certain acts within a limited time is valid, and the question whether the operations of the railroad as a whole may be carried on profitably is not an issue in the case.

"The distinction between an order relating to such a subject and an order fixing rates coming within either of the hypotheses which we have stated is apparent. This is so because as the primal duty of a carrier is to furnish adequate facilities to the public, that duty may well be compelled, although by doing so as an incident some pecuniary loss from rendering such service may result. It follows, therefore, that the mere incurring of a loss from the performance of such a duty does not in and of itself necessarily give rise to the conclusion of unreasonableness, under the doctrine of *Smyth v. Ames*, 169 U. S. 526." *Atlantic C. L. R. Co. v. North Carolina C. C.*, 206 U. S. 1, 26. But the

fact that the performance of such duty is unremunerative is a weighty and important factor for consideration in passing upon the reasonableness of the provision. *Missouri P. R. Co. v. Kansas*, 216 U. S. 262. The real question is whether, considering all the facts in evidence as to the impracticability of complying with the statute in many instances in east-bound shipments, and for the greater portion of the year in west-bound shipments, the necessity of preventing discrimination against interstate traffic by reason of giving precedence to trains carrying live stock for intrastate delivery, and of compliance with the federal safety appliance act, the requirements of the law are reasonable, or whether they constitute an unreasonable exercise of the police power and interfere with the constitutional rights of the defendant. If the legislators could have known or foreseen the necessary delays and the innumerable contingencies that may occur in the operation of trains as shown by evidence in these cases, they, we feel certain, would have allowed further latitude to the carriers. The legislature knew of the existence of the evil, and that stock shippers were often vexed by delays whereby they suffered damage, and properly sought to provide a remedy. There is no doubt that a statute or order regulating the rate of speed of the carriage of live stock is a proper exercise of the police power of the state, whether provided for by the legislature or by an order or regulation of the state railway commission, but such a statute or order must be reasonable and practical in its operation, and it must not impose an undue burden upon the carrier, nor take away any of its constitutional rights. In North Dakota a statute similar to this was declared unconstitutional before experience as to its operation had been had. *Downey v. Northern P. R. Co.*, 19 N. Dak. 621, 26 L. R. A. n. s. 1017.

The state of Kansas has a speed statute (Laws 1907, ch. 276) which fixes 15 miles an hour as the rate of speed, "unless prevented by unavoidable cause," and it allows the recovery of all damages to the shipper, with a reasonable

Davison v. Chicago & N. W. R. Co.

attorney's fee. This law seems to be reasonable in its terms, and apparently has been complied with, since no opinions have been reported touching its validity.

The question whether statutes which attempt an unreasonable exercise of the police power may be valid has been directly passed upon by the United States supreme court. Though that court concedes the validity of laws designed to secure the safety and comfort of passengers, or employees, or persons crossing the railroad tracks, it has been repeatedly held that a statute making an unreasonable exercise of the police power of the state, which interferes with interstate commerce, or which has the effect to deprive the carrier of its property without due compensation, or to deny it the equal protection of the laws, is invalid. A discussion of how far the right of regulation may go, with a consideration and citation of prior cases on the subject, may be found in the opinion of Mr. Justice Brown in *Cleveland, C., C. & St. L. R. Co. v. Illinois*, 177 U. S. 514, wherein a requirement that express trains intended only for through passengers should stop at every county seat, when accommodations were provided by local trains, was held to be unreasonable and invalid. *Chicago, B. & Q. R. Co. v. Railroad Commission of Wisconsin*, 237 U. S. 220.

A Texas statute (2 Sayles Tex. Civ. St., art. 4502) provided that, when the shipper made application in writing to a railroad company to supply a number of cars for the shipment of freight, on the failure of the company to supply such cars within six days from the receipt of the application, it should forfeit to the party applying \$25 a car for each car they failed to furnish, and be liable for all damages the applicant might sustain, with a countervailing penalty for failure on the part of the shipper to take the cars when furnished. The only exemption provided was that the act "shall not apply in case of strikes or other public calamity." In the opinion in *Houston & T. C. R. Co. v. Mayes*, 201 U. S. 321, the court said, by Mr. Justice Brown: "While there is much to be said in favor of laws compelling railroads to furnish adequate facilities for the transportation of

both freight and passengers, and to regulate the general subject of speed, length and frequency of stops, for the heating, lighting and ventilation of passenger cars, the furnishing of food and water to cattle and other live stock, we think an absolute requirement that a railroad shall furnish a certain number of cars at a specified day, regardless of every other consideration except strikes and other public calamities, transcends the police power of the state and amounts to a burden upon interstate commerce. It makes no exception in cases of sudden congestion of traffic, an actual inability to furnish cars by reason of their temporary and unavoidable detention in other states, or in other places within the same state. It makes no allowance for interference of traffic occasioned by wrecks or other accidents upon the same or other roads, involving a detention of traffic, the breaking of bridges, accidental fires, washouts or other unavoidable consequences of heavy weather."

"Although the statute in question may have been dictated by a due regard for the public interest of the cattle raisers of the state and may have been intended merely to secure promptness on the part of the railroad companies, in providing facilities for speedy transportation, we think that in its practical operation it is likely to work a great injustice to the roads, and to impose heavy penalties for trivial, unintentional and accidental violations of its provisions, when no damage could actually have resulted to the shippers."

"While railroad companies may be bound to furnish sufficient cars for their usual and ordinary traffic, cases will inevitably arise where, by reason of an unexpected turn in the market, a great public gathering, or an unforeseen rush of travel, a pressure upon the road for transportation facilities may arise, which good management and a desire to fulfil all its legal requirements cannot provide for, and against which the statute in question makes no allowance.

"Although it may be admitted that the statute is not far from the line of proper police regulation, we think that suf-

ficient allowance is not made for the practical difficulties in the administration of the law, and that, as applied to interstate commerce, it transcends the legitimate powers of the legislature."

' It is clearly shown that, unless further exceptions and exemptions are interpolated in the law, the operation of trains at the speed required by the statute would in many cases be impracticable, would operate to interfere with the operation of trains carrying mail, interstate commerce, and with the transportation of other freight. It is also in evidence that an enormous increase in the rates charged by defendant would be necessary in order to so adjust the whole transportation facilities of the railroad as to provide for accelerated service, in many instances requiring special trains consisting often of from one to a few cars of live stock. These are burdens which interfere with the business of transportation and violate defendant's constitutional rights.

It is argued that, since this court has held that a statute is valid making a railroad company insurer of the safety of passengers, regardless of whether it was at fault for an accident which caused an injury, it must hold that this statute is also proper legislation. The law as a matter of public policy exerts exceeding care to conserve human life and personal safety. Such an object is not to be compared to the mere monetary loss which may occur by reason of delay in the carriage of live stock. Public safety is of supreme importance, and stringent measures, used to exert pressure upon carriers of passengers so that nothing less than the greatest care and diligence will be used by them in such carriage, are entirely justifiable. The statute under consideration is an exercise of police power, and it must be reasonable in order to be valid. The legislature has not the power to interfere in an arbitrary manner with the conduct of a business or occupation by a police regulation, unless the regulation bears some definite and reasonable relation to the public welfare, and to enforce it does not infringe upon constitutional rights. Each person is guar-

anted the liberty to carry on his lawful business or occupation unhampered, except by regulations necessary for the public welfare, having just relation to the object sought, and not unreasonably oppressive.

Plaintiffs argue that the best answer to the contention that the railroad companies cannot comply with the law is the fact that the evidence shows that they are complying with it. Where this evidence is to be found in the record has not been pointed out, and we have not found it. Plaintiffs say that the court can take notice of the fact that few cases have been brought here on appeal. On the other hand, defendant says that a large number of claims are outstanding awaiting a decision upon these appeals. These statements are alike based on facts not in the record. The contention of plaintiffs is that, "so long as the aggregate business of transporting this class of property is adequate and profitable, the company cannot complain, and no claim or color of claim can be made, upon the evidence, that the Northwestern railroad company is not making money in the transportation of live stock in Nebraska," and much is said in the briefs with regard to the profits that defendant is making, the dividends it is paying, and the amount of money it is investing. There is no evidence of this kind in the record, and, if the facts are as stated, they are not so public and notorious that the court can take judicial notice of them. Under the undisputed evidence, we conclude that the statute cannot be enforced without unduly interfering with the constitutional rights of this defendant. It is possible that with other railroads, better built and equipped, whose lines run through a richer territory, with fewer converging branch lines, or with heavier rails or double tracks, the difficulties shown here do not exist, and the act might be enforceable, but we cannot draw a line and say the act is enforceable as applied to one railroad and invalid as to another, or as to shipments in one direction and not to shipments in the other direction. The object and purpose of the law is within the proper police powers of the state. The legislature is about to meet, and it is to be presumed

Black Bros. v. Logan County.

that, with the knowledge gained by experience of the practical operation of the statute, that body may amend it by allowing further and proper exemptions, permit other defenses to be made, or in such other manner that it may not be vulnerable to attack. The several judgments of the district court are reversed, and the causes are remanded.

REVERSED.

BLACK BROTHERS, APPELLANTS, v. LOGAN COUNTY, APPELLEE.

FILED DECEMBER 9, 1916. No. 19081.

Taxation: RECOVERY OF PAYMENT. Taxes paid cannot be recovered back on the ground that the property of the tax-debtor had been twice assessed, where the tax receipt neither shows payment under protest nor any ground of protest. Rev. St. 1913, sec. 6491.

APPEAL from the district court for Logan county: HANSON M. GRIMES, JUDGE. *Affirmed.*

Thomas F. Hamer and Frank O. Divisek, for appellants.

W. E. Hill and B. F. Johnson, contra.

ROSE, J.

This is a proceeding to recover from Logan county \$163.19 paid by plaintiffs as taxes on personal property alleged to have been legally assessed in Thomas county, where the valid taxes are said to have been paid. The tax receipt issued by the treasurer of Logan county, considered as part of plaintiffs' claim, did not show payment under protest or any ground of protest. The trial court sustained a demurrer to the petition. Plaintiffs refused to plead further, and from a judgment of dismissal they have appealed.

Black Bros. v. Logan County.

Was the demurrer properly sustained? Referring to the right of a tax-debtor to pay taxes under protest, the revenue law provides:

"If such person claim a tax, or any part thereof, to be invalid for the reason that the property upon which it was levied was not liable to taxation, or that the property has been twice assessed in the same year and taxes paid thereon, he may pay such taxes under protest to the county treasurer, or other proper authority, and it shall be the duty of the treasurer, or other proper authority receiving such tax, to give a receipt therefor stating thereon that they were paid under protest, and the grounds of such protest, whether or not taxable or twice assessed, and taxes paid thereon." Rev. St. 1913, sec. 6491.

The tax receipt is a part of the tax-debtor's claim for taxes paid under protest, and is made so by a statute declaring:

"Within thirty days after paying such taxes the person paying them shall file a statement in writing, duly verified, with the county board, setting forth the amount of tax paid under protest, the grounds of such protest, and shall attach thereto the receipt taken for said taxes." Rev. St. 1913, sec. 6491.

Plaintiffs contend that these provisions are merely directory, and that the treasurer's failure to comply with them does not affect the remedy of the taxpayer. This construction would in a measure defeat the purpose of the law-makers. Taxes essential to county government are generally collected in small amounts from many tax-debtors. The collection of revenue involves many transactions which are not committed to the memory of county officers or taxpayers. Prompt payment is an essential feature of the revenue system. In absence of statute, taxes voluntarily paid cannot be recovered back. The statute creates a remedy, but requires prompt payment under protest, leaving for future determination questions relating to invalidity of taxes. The legislature intended to make the receipt for taxes paid under protest evidence of the protest and of the

Cole v. Myers.

grounds thereof. This is a method of pointing out the items of taxes assailed as invalid, and of giving timely notice to public officers to prepare for a defense, if any. The duty of a treasurer to note on the tax receipt a payment made under protest and the grounds thereof is a reasonable one and he cannot successfully resist a proper demand for its performance. To require a taxpayer to see that the steps essential to his statutory right to recover back illegal taxes paid are taken is not exacting too much. The statute thus construed is a protection to the taxpayer as well as to the public. In this view of the revenue law, the demurrer was properly sustained.

AFFIRMED.

HAMER, J., not sitting.

WILLIAM A. COLE, RECEIVER, APPELLEE, v. ORVAL C. MYERS
ET AL., APPELLEES; NATIONAL FIDELITY & CASUALTY
COMPANY, APPELLANT.

FILED DECEMBER 9, 1916. No. 19668.

Subrogation: SURETIES. Where a bank fails while having on deposit county funds illegally deposited in excess of the amount for which the bank had given a depository bond pursuant to the depository law of Nebraska, and the surety thereon pays the county the full amount of its liability and the treasurer's surety pays the over-deposit, the sureties may share ratably the dividends declared by the bank's receiver upon the county's claim for the entire deposit. Rev. St. 1913, sec. 6662.

APPEAL from the district court for Nuckolls county:
LESLIE G. HURD, JUDGE. *Affirmed.*

Nye F. Morehouse, for appellant.

*Montgomery, Hall & Young, Bernard McNeny and
Stubbs & Stubbs, contra.*

ROSE, J.

This is a suit in the nature of a bill of interpleader. The First National Bank of Superior failed when Nuckolls county was an unpaid depositor therein to the extent of \$13,189.61, including an overdeposit of \$3,189.61 made by the county treasurer in violation of statute. Rev. St. 1913, sec. 6662. For the protection of county funds deposited in the bank the American Surety Company had become liable on the bank's depository bond in the penal sum of \$10,000. The National Fidelity & Casualty Company was surety on the county treasurer's official bond. After the bank failed the county treasurer filed with the receiver a claim for \$13,189.61. The American Surety Company promptly paid the county the amount of its liability as surety (\$10,000) and to that extent procured an assignment of the deposit. Later the Fidelity & Casualty Company paid the county the remainder of the deposit (\$3,189.61), took an assignment of it, and also obtained a formal assignment of the claim for \$13,189.61, which the county treasurer had filed with the receiver. The receiver afterward paid the National Fidelity & Casualty Company a dividend of \$1,979.37, being 15 per cent. of the county's entire deposit of \$13,189.61. The sureties are rival claimants to dividends. The purpose of the suit, which was brought by the receiver, is to determine the respective rights of the sureties. As defendants they are joined with Orval C. Myers, county treasurer. The trial court held that the American Surety Company, the surety on the bank's depository bond, is entitled to share the dividend with the National Fidelity & Casualty Company, the surety on the treasurer's bond, in the proportion that \$10,000 bears to \$3,189.61. Judgment was accordingly rendered in favor of the American Surety Company against the National Fidelity & Casualty Company for \$1,664.50, being 15 per cent. of \$10,000, with interest. The latter has appealed.

The sureties are not contesting the validity or priority of separate claims against the insolvent bank, but are assert-

ing hostile claims to dividends on a single uncontested claim for an unpaid deposit of \$13,189.61.

The treasurer's surety calls attention to the liability of the bank's surety for the bank's obligation to safely keep the deposits of county funds, to pay "each and every part thereof, upon the written demand of the county treasurer," and to "save and keep the people of Nuckolls county, and the county treasurer harmless and indemnified." In this connection the treasurer's surety argues that, having paid the debt of \$3,189.61 owing by the treasurer and the bank to the county, it is by subrogation entitled to all of the rights and remedies of both; that the county and the treasurer, after receiving \$10,000 from the bank's surety, are entitled to dividends on \$13,189.61, until the overdeposit of \$3,189.61 is fully paid; that the effect of allowing the bank's surety to draw dividends before the overdeposit is paid from the assets of the bank is to reduce the penalty in the depository bond below \$10,000, thus injuring the county and the treasurer; that the bank's surety is not entitled to the benefits of subrogation until the bank's debt is paid in full. On the other hand, the bank's surety insists that, when it discharged its full liability by paying \$10,000, which would have been the maximum amount of its principal's indebtedness to the county, except for the illegal overdeposit made by the treasurer, it was, to the extent of \$10,000, subrogated to all of the rights of the county. The question thus presented is not free from difficulty. The courts have not agreed on the solution. There is reason on both sides of the controversy. The doctrine invoked by the treasurer's surety has been stated as follows:

"As a surety is not entitled to subrogation until the debt is paid in full, a surety on a bond to secure a city in the deposit of moneys in an insolvent banking institution is not entitled to subrogation, though he has paid the bond, where the bank was still largely indebted to the city, and the total amount of dividends, together with the amount of the bond, would not discharge the obligation; for in such case, if the surety were *pro rata* subrogated to the

city's right to receive dividends, the city would be injured." *Knaffl v. Knoxville Banking & Trust Co.*, 133 Tenn. 655. *Board of Health v. Teutonia Bank & Trust Co.*, 137 La. 422; *Buffalo German Ins. Co. v. Title Guaranty & Trust Co.*, 99 N. Y. Supp. 883; *Commissioner of Banking v. Chelsea Savings Bank*, 161 Mich. 691.

There is a recognized exception to the general rule, however, where the surety discharges his full liability to the creditor by paying the entire debt protected by his suretyship, though the principal still owes the creditor an additional sum. The doctrine on which the exception is based seems to have been first announced in *Ex parte Rushforth*, 10 Ves., Jr. (Eng.) 409. In a later English case the principle was restated in the following form:

"When a surety is only surety for a part of the debt, and has paid that part of the debt, he is entitled to receive the dividend which the principal debtor pays in respect of that sum which the surety has discharged." *Gray v. Seckham*, L. R. 7 Ch. (Eng.) 680.

A review of the English cases shows that the doctrine on which the distinction is based is firmly established. *Ellis v. Emmanuel*, 1 Exch. Div. (Eng.) 157. While the leading case has been criticised in *Knaffl v. Knoxville Banking & Trust Co.*, 133 Tenn. 655, as announcing a doctrine at variance with the rules of equity governing subrogation, the exception, in the opinion of another American court, rests on a logical basis. *Buffalo German Ins. Co. v. Title Guaranty & Trust Co.*, 99 N. Y. Supp. 883.

In the present case, what is the contract of suretyship into which the bank's surety entered? The depository bond for \$10,000 was executed under a statute providing:

"For the security of the funds so deposited under the provisions of this article the county treasurer shall require all such depositories to give bonds for the safe-keeping and payment of such deposits and accretions thereof, which bond shall run to the people of the county and be approved by the county board, and conditioned that such depository shall, at the end of each and every month, render

to the treasurer and county board a statement in duplicate, showing the several daily balances and the amounts of moneys of the county held by it during the month, and the amount of the accretion thereof, and how credited.

* * * The treasurer shall not have on deposit in any bank at any time more than the maximum amount of the bond given by said bank in cases where the bank gives a guaranty bond." Rev. St. 1913, sec. 6662.

The statute is by construction a part of the depository bond. *Blaco v. State*, 58 Neb. 557. In entering into the contract of suretyship, the surety had a right to assume that the treasurer would comply with the statute and limit his deposit to \$10,000. The bond was given to protect legal deposits of county funds to the contractual and statutory maximum of \$10,000, and not as security for an illegal deposit in excess of that sum. Both the surety's liability and the debt protected by the suretyship are limited to \$10,000. In paying the amount of the bond, the bank's surety not only discharged its legal liability, but also discharged the entire debt to secure which the bond was given. The terms of the contract of suretyship, when considered with the statute and with the public duties of the treasurer, will admit of no other construction.

After the bank's surety paid the county the bank's debt in the sum of \$10,000, it became a creditor of the bank to that extent, and the county, by reason of the treasurer's illegal overdeposit, remained a creditor in the sum of \$3,189.61. The trial court held that the two creditors described should share ratably in the dividends declared by the bank's receiver. The ruling is challenged as erroneous, for the reasons that the treasurer, when the bank failed, became personally liable to the county for the amount of the unpaid overdeposit; that the bank's surety agreed to indemnify him; that the surety on the treasurer's bond paid the county the remainder of the bank's debt for which the treasurer was liable, amounting to \$3,189.61, and was thus subrogated to the treasurer's rights; that consequently the bank's surety will not be entitled to participate in

dividends until the bank's debt for which the treasurer is liable has been paid from the assets of the insolvent bank.

The position is untenable. The treasurer's surety cannot trace through subrogation to the treasurer a right to dividends superior to that of the bank's surety. The treasurer's compliance with the statute would have prevented the bank from incurring an indebtedness to the county in excess of \$10,000. In that event the debt of the bank would have been paid in full. By making an over-deposit contrary to the letter of the law, the treasurer incurred a personal liability to the county which otherwise would have had no existence. Neither the treasurer nor his surety will be permitted to make use of this wrongful act to establish a right to dividends superior to that of the bank's surety.

Under the conditions outlined, the further point that the treasurer's surety, by asserting rights of the county, can prevent the bank's surety from sharing ratably in the dividends does not seem to be well taken. The reason for the rule that a surety is not entitled to subrogation until the debt of the principal has been paid in full does not apply to the facts in the present case. The bank's surety paid the entire debt for which the depository bond was given as security. If injury to the county would result from permitting the bank's surety to share the dividend, the county's loss would not grow out of the debt secured by the depository bond. Such loss, if any, would be traceable to the illegal conduct of the treasurer in making deposits in excess of the penalty named in the depository bond. For this wrongful act on the part of the treasurer, neither the bank's surety nor the county is in anywise responsible. If the treasurer had complied with the law, the principal's debt would be paid in full and the right of the bank's surety to subrogation would be unassailable. In that event the ultimate loss of the bank's surety would be less than the maximum amount for which the depository bond was given. To deny or postpone subrogation because the treasurer, for whose wrongful act the bank's surety was not responsible,

Bentley v. Space.

made overdeposits in violation of law would extend the liability of the bank's surety beyond that created by the contract of suretyship. In respect to the dividends, therefore, the bank's surety and the treasurer's surety are asserting claims of equal rank. This conclusion results in the affirmance of the judgment of the district court.

AFFIRMED.

SEDGWICK and HAMER, JJ., not sitting.

JOHN A. BENTLEY, APPELLEE, v. GEORGE W. SPACE,
APPELLANT.

FILED DECEMBER 9, 1916. No. 18942.

Specific Performance: MISLEADING STATEMENTS. A court of equity may refuse to decree specific performance of a contract for the sale of land at the instance of the vendor, where he has misled the vendee as to the quantity to be conveyed, even though he acted innocently in so doing.

APPEAL from the district court for Cheyenne county:
HANSON M. GRIMES, JUDGE. *Reversed, with directions.*

C. Petrus Peterson, R. W. Devoe and J. M. Swenson, for appellant.

W. P. Miles and J. L. McIntosh, contra.

FAWCETT, J.

From a decree of the district court for Cheyenne county, awarding plaintiff a decree for the specific performance of a contract for the sale of land in that county, defendant appeals.

The written agreement entered into between the parties, dated October 23, 1913, recited the sale by plaintiff to defendant of the north half of section 7, township 15, range 48, west of the sixth P. M., in Cheyenne county, "containing 320 acres, more or less, according to the government survey thereof." The consideration expressed in the agreement was \$7,360, payable \$500 cash, \$3,860 on or before March 1, 1914, remainder of \$3,000 on or before five years, with interest at 6 per cent. per annum, to be secured by first mortgage on the land. The \$500 was paid by defendant at the time of the execution of the agreement. When March 1, 1914, arrived, it was learned that the tract of land did not contain 320 acres, but was 24.2 acres short. Upon learning this fact, defendant refused to take the land, and this suit was instituted. The petition is in the usual form. The answer alleged that defendant purchased the land on the representation of plaintiff that it contained 320 acres; that he would not have purchased it, nor have entered into the contract, if he had known that it contained a less number of acres than 320; and by cross-petition defendant asked for a return of the \$500 which he had paid, together with interest from the date of payment. The answer further alleged that plaintiff represented to him that the tract of land contained 320 acres, for which he agreed to pay \$23 an acre; and that the consideration of \$7,360 was ascertained by multiplying 320 (acres) by 23 (dollars an acre). In his answer to the cross-petition of defendant, plaintiff denied that he made any representations to defendant as to the acreage; and alleged that at the time he made the sale he was not aware that the half section involved was short; that the land was sold by him to defendant as a half section of 320 acres, more or less; that the tract was sold for the specific sum of \$7,360; and set out other matters which need not be considered. The reply to this answer was a general denial.

The evidence shows without dispute that the gross sum of the consideration was ascertained in the manner alleged by defendant. Defendant testified in his own behalf that

on the day plaintiff showed him the land in controversy he first showed him two or more other tracts, one of which tracts contained 160 acres; that he told plaintiff "it wasn't enough, and he said he thought he could get me the 80 adjoining it, and I told him I didn't want less than 320 acres, because I had two sons and I wanted to give them a farm of 160 acres each;" that plaintiff then said he had 320 acres northeast of town, which he would sell at \$23 an acre. He further testified that prior to reaching the land in controversy plaintiff stated to him "that there were 320 acres in it." Plaintiff took the stand on rebuttal, but made no attempt to deny this testimony given by defendant. It stands, therefore, established without dispute that plaintiff knew defendant was seeking to purchase a tract of land containing 320 acres, for the purpose of giving two sons a farm of 160 acres, each. It is conceded by the parties that neither of them knew at the time the agreement was entered into that they were dealing with a short half-section of land. The trial court found "that the consideration agreed upon, for said sale, was \$23 an acre," and that both parties supposed that the tract contained approximately 320 acres, when in fact it contained only 295.8 acres. On these findings the court adjudged that defendant was not entitled to avoid the contract, but must take and pay for the 295.8 acres at the agreed price of \$23 an acre; that after deducting the price of the 24.2 acres, at \$23 an acre, defendant should specifically perform the contract for the reduced gross consideration within 60 days from the date of the decree, and refused defendant relief under his cross-petition.

We think the district court erred. The evidence of defendant shows that he would not have entered into the contract had he known that the tract contained only 295.8 acres. While it may be conceded that a court of equity will compel specific performance of a contract which the parties intended to make, but which, through their mutual mistake, is not the one actually made, it will not compel performance of a contract materially dif-

Bentley v. Space.

ferent from the one which they both intended to make. That would be to make a new contract for the parties, and one which one of them at least never intended to make. In other words, a court of equity will not grant its affirmative remedy to compel the defendant to perform a contract which he did not intend to make, or which he would not have entered into had its true effect been understood; nor will specific performance of a contract for the sale of land be decreed at the instance of the vendor, where he has misled the vendee as to the quantity to be conveyed, even though he acted innocently in so doing. Pomeroy, *Specific Performance of Contracts* (2d ed.) sec. 250; 2 Pomeroy, *Equity Jurisprudence* (3d ed.) sec. 860; 2 Story, *Equity Jurisprudence* (13th ed.) secs. 769, 770.

In 2 Warvelle, *Vendors* (2d ed.) sec. 749, it is held: "It is beyond dispute that a purchaser is entitled to all that he bargains for, and is under no obligation to accept a part or to accept compensation or abatement, hence, if he contracts for the purchase of land of defined area or specified quantity, he is under no obligation to complete the contract if the vendor is unable to convey all that the agreement calls for."

In *Allen v. Kirk*, 219 Pa. St. 574, it is said: "It is ungracious to ask that the appellees be compelled to take that which, under a further unchallenged finding of the court, they would not have agreed to take if they had known its real dimensions. * * * The learned judge below cited authorities to support his correct conclusion that the bill ought to be dismissed, but he needed none. The equities were all with the appellees. The appellant, who sought relief, came into court with none. He had innocently and unintentionally, as found by the court, misled the parties with whom he contracted, but out of their mistake, so induced, no contract arose which equity would enforce."

In 2 Warvelle, *Vendors* (2d ed.) sec. 749, it is said: "If the vendor cannot make out a title as to part of the subject-matter, or in case of a deficiency in the quantity of the

land, equity will not compel the vendee to perform the contract even in part."

In *Flynn v. Finch*, 137 Ia. 378, it is held: "Deceit in representing the area of land need not be shown to justify denial of specific performance of a contract to convey; innocent misrepresentation to a substantial extent, which induced the making of the contract, is sufficient to defeat such relief at the suit of the party making the representations. Evidence held to show misrepresentation."

In *Gurley v. Hiteshue*, 5 Gill (Md.) 217, it is said: "A court of equity, professing as it does to lend its aid exclusively to cases in which a claim can be conscientiously enforced, will never coerce the specific performance of a contract for a party who has not acted fairly, openly and without suppression of any important fact, or the expression of any falsehood. Whether with a fraudulent design or innocently, yet if a false impression has been conveyed and made the basis of the contract, this extraordinary jurisdiction of the court will not be exercised by coercing a specific performance."

Our own cases are in harmony with these authorities. *Stanton v. Driffkorn*, 83 Neb. 36, and other Nebraska cases therein cited.

While authorities may be found which seem to point the other way, we think the authorities cited clearly state the correct rule applicable to the facts in the case we are now considering. Defendant thought he was purchasing 320 acres of land. He was warranted in thinking so because the plaintiff stated that it contained that number of acres. He agreed to pay \$23 an acre for that number of acres, and signed an agreement for the gross consideration, ascertained by multiplying the number of acres which the tract was represented to contain by the price per acre agreed upon. Upon learning that the tract contained many acres short of the number represented, he declined to proceed with the contract. He was justified in so doing, and, having paid \$500 upon the contract in reliance upon the represen-

tations so made, he is entitled to have that money repaid to him.

It is claimed by plaintiff that after the parties had ascertained that the land was short they had a conversation in relation thereto, in which he first offered to allow defendant a credit of \$200 if he would proceed with the contract, and then offered to throw off half of the acreage that was short, at the rate of \$23 an acre; that in a subsequent conversation he told defendant that he would throw off the entire shortage in acreage. He did not testify that defendant accepted this offer. The fact that defendant did not at that time consent to take the land if the price of the 24.2 acres were deducted and the failure of the plaintiff to testify that he did so agree are shown by plaintiff's allegations in his answer to defendant's cross-petition, in which he alleges that the first time he became aware that defendant was dissatisfied with the deal was about March 4 or 5, when defendant told him that he did not know the land was short in acreage; that "plaintiff told defendant that he was selling the land to him, just as he bought it himself, and that he did not know the half-section was short, and said to defendant that under the conditions he was willing to make a reduction in the consideration for said land equal to one-half the short acreage, but that he thought the defendant ought also to stand for one-half the shortage, and that the defendant then told plaintiff that he would see him again with reference to it, and the defendant did come around to see the plaintiff about the shortage of acreage, and the plaintiff then said to the defendant that he would be willing to throw off an amount of the consideration for the purchase of said tract equal to the amount of said short acreage multiplied by the price per acre of said land, just the same as though there were 320 full acres in it, which would be about \$560, and that the defendant then said he would be around again, and that plaintiff thought there would be no other complaint, and that the deal would be finished according to contract." It appears, therefore,

Wiese v. City of South Omaha.

from plaintiff's own allegations that when he wired to his vendor for a deed he did so without any agreement on the part of defendant to accept it, and that he sent his wire indulging in the mere "thought there would be no other complaint, and that the deal would be finished according to contract."

We are unable to discover any theory upon which plaintiff should be permitted to recover. The judgment of the district court is reversed and the cause remanded, with directions to dismiss plaintiff's suit for want of equity, and to enter judgment in favor of defendant upon his cross-petition, as prayed therein.

REVERSED.

MORRISSEY, C. J., and SEDGWICK and HAMER, JJ., dissent.

HENRY N. WIESE ET AL., APPELLANTS, v. CITY OF SOUTH OMAHA ET AL., APPELLEES.

FILED DECEMBER 9, 1916. No. 18964.

1. **Municipal Corporations: STREET IMPROVEMENTS: VOID ASSESSMENT: RE-ASSESSMENT.** Where a statute provides that, if an assessment for a local improvement shall be declared void on the ground that the proceedings of the city council were "defective, irregular or void, including among other things the want of jurisdiction," the city council may make a new assessment upon lands benefited by the improvement, except where the first assessment was made "for an unauthorized purpose," or there was "an entire and complete want of authority in the council to proceed in the premises." And such new assessment may be made where the first assessment has been adjudged void by the courts on the ground that the ordinance creating the improvement district failed to properly define the limits of the district. Rev. St. 1913, sec. 4748.
2. ———: ———: ———: **STATUTORY PROVISIONS: CONSTITUTIONALITY.** The provisions of the South Omaha charter in 1905 did not authorize the city council to assess lands benefited by a local improvement in excess of the benefits, and was not unconstitutional as taking property without due process of law. Comp. St. 1905, ch. 13, art. II, sec. 128, subs. IV, XVIII.
3. **Statutes: REPEAL AND RE-ENACTMENT.** "It is a settled rule of construction in this state that a simultaneous repeal and re-enactment of a statute or section thereof, in terms or in substance, is a mere

Wiese v. City of South Omaha.

affirmance of the original and not a repeal thereof in the strict or constitutional sense of the word." *Stenberg v. State*, 50 Neb. 127.

APPEAL from the district court for Douglas county:
ABRAHAM L. SUTTON, JUDGE. *Affirmed*.

A. H. Murdock and Arthur C. Pancoast, for appellants.

John A. Rine, W. C. Lambert and Murphy & Winters,
contra.

FAWCETT, J.

This is an action by plaintiffs to enjoin the collection of and to cancel special assessments levied against their property in South Omaha for the grading of a portion of K street. From a judgment dismissing the action, plaintiffs have appealed.

Proceedings were instituted in 1905 for the grading of a portion of K street and assessments were levied against property benefited. In an action by the present plaintiffs and others, the assessment was declared void on the ground that the city council was without jurisdiction to make the assessment since the ordinance creating the improvement district failed to properly define the limits of the district. *Wiese v. City of South Omaha*, 85 Neb. 844. Thereafter the city council passed an ordinance for the creation of an improvement district in which the grading had been done, and another ordinance for the assessment of benefits. The assessment was made under authority of the following statutory provision: "Whenever an assessment for any of the improvements provided for herein or for any local improvement which has been heretofore made, or which hereafter may be made, is void or has been, or may be, declared void, or its enforcement under the laws of this state or the charters of cities of this class is not possible or is refused, or for any other cause the same is void or may be declared void by any court, either directly or by virtue of any decision of such court, the mayor and council of such city shall, by ordinance, order and make a new assessment or re-assessment upon the lots, blocks, land and parcels of lands which have been or will be benefited by such local

Wiese v. City of South Omaha.

improvements, it being the true intent and meaning of this chapter to make the cost and expense of all local improvements payable by the real estate benefited to the extent of the improvements by the same, either by reason of the first assessment or re-assessment therefor, and notwithstanding the proceedings of the mayor and council, or of any of the officers of the city, may be found to be defective, irregular or void, including among other things the want of jurisdiction, and the city council or such officer to proceed in the premises, as well as other defects, except where such assessments may be made for an unauthorized purpose, or there is an entire and complete want of authority in the council to proceed in the premises." Rev. St. 1913, sec. 4748.

Plaintiffs contend that the section quoted does not authorize a re-assessment under the circumstances of this case. Does the statute authorize a re-assessment where the original assessment has been declared void on the ground that the ordinance creating the improvement district failed to properly define the limits thereof? It is the contention of plaintiffs that in such a case there is an "entire and complete want of authority in the city council to proceed in the premises," and for that reason a re-assessment was not authorized. In the former opinion it was held that failure of the ordinance to properly define the limits of the district rendered the assessment void for want of jurisdiction. In one sense, want of jurisdiction is "want of authority in the city council to proceed in the premises." The statute, however, provides that re-assessments may be made though the proceedings may be found to be void for "the want of jurisdiction." Without attempting a definition, it may be said that the city council did not proceed with "entire and complete want of authority" merely because the ordinance creating the improvement district did not properly define the limits thereof. The proceedings of the city council were based upon a petition filed with the city clerk which was signed by owners representing a majority of the taxable feet front upon the street to be

improved. The city council did not proceed with "entire and complete want of authority" within the meaning of that term as used in the section quoted.

Is the re-assessment statute unconstitutional as contended by plaintiffs? The power of the legislature to authorize a re-assessment, in case the first assessment has been declared invalid for failure to comply with provisions which the legislature might in the first instance have dispensed with, is generally upheld. *Spencer v. Merchant*, 125 U. S. 345; *City of Seattle v. Kelleher*, 195 U. S. 351; *Lombard v. West Chicago Park Commissioners*, 181 U. S. 33; *West Chicago Park Commissioners v. Farber*, 171 Ill. 146; *Mayor & City Council of Baltimore v. Ulman*, 79 Md. 469; *Warren v. Street Commissioners*, 187 Mass. 290; *State v. District Court of Blue Earth County*, 102 Minn. 482; *Jones v. Town of Tonawanda*, 158 N. Y. 438; *Frederick v. City of Seattle*, 13 Wash. 428; *Sanderson v. Herman*, 108 Wis. 662; *Schintgen v. City of La Crosse*, 117 Wis. 158. The first assessment was declared void for failure of the ordinance creating the improvement district to properly define its limits. The legislature might have authorized the city council on its own initiative to improve the street and, after the improvement had been completed, to create an improvement district and provide for the assessment of the property benefited, if notice thereof and opportunity were given to property owners to be heard upon the assessment. *Londoner v. City and County of Denver*, 210 U. S. 373; *Hoopes v. City of Omaha*, 99 Neb. 460. The legislature has provided that by a re-assessment the failure of the city council to comply with dispensable requirements may be corrected. Property owners who have been benefited by an improvement and who have been given an opportunity to be heard upon the assessment of the benefits are not deprived of any constitutional rights by a re-assessment. Plaintiffs contend, however, that the judgment of this court declaring the first assessment void cannot be overruled or annulled by a re-assessment, and cite *McManus v. Hornaday*, 124 Ia. 267. The case may

Wiese v. City of South Omaha.

be distinguished. The first action in Iowa was brought upon a tax certificate issued by the city to the plaintiff. In that suit the court held that the tax certificate was void and uncollectible. Subsequently, the legislature passed an act legalizing the action of the city in making the improvement. A second action was brought "by the same plaintiff against the same defendant upon the same certificate, and for a recovery of the same tax." *McManus v. Hornaday*, 124 Ia. 267, 273. The second suit does not appear to have been based on a new certificate issued after a re-assessment had been made. If this had been done a recovery would have been sustained. *Tuttle v. Polk & Hubbell*, 84 Ia. 12.

It is also contended that the statute under which the improvement was ordered is unconstitutional. Comp. St. 1905, ch. 13, art. II, sec. 128, subds. III, IV. The argument is that the statute provided that the entire cost of the improvement should be assessed against property owners within the district though in excess of the benefits derived from such improvement. *Schneider v. Plum*, 86 Neb. 129; *Cain v. City of Omaha*, 42 Neb. 120. A fair reading of the statute does not sustain this contention. The statute provided that special taxes to cover the cost of the improvement should be assessed on all lots "to the extent of the special benefit to such lots." Comp. St. 1905, ch. 13, art. II, sec. 128, subd. XVIII. Subdivision XXVII declared it to be "the true intent and meaning of this act to make the cost and expense of all local improvements payable by the real estate benefited to the extent of the improvements by the same."

It is further contended that the act of 1905, under which the improvements were made, was repealed in 1907, and that there was no saving clause. The answer to this is: The act of 1907 was, in substance and substantially, in terms a re-enactment of the act of 1905, and hence was not a repeal in the strict or constitutional sense of the word. *Stenberg v. State*, 50 Neb. 127.

AFFIRMED.

ROSE, J., not sitting.

PEARL R. BRADY, APPELLANT, v. STATE INSURANCE COMPANY, APPELLEE.

FILED DECEMBER 9, 1916. No. 19014.

1. **Election of Remedies.** One who has voluntarily chosen an appropriate legal remedy and obtained full satisfaction therefor, with knowledge of the facts and of his rights, will not ordinarily be allowed to afterwards resort to an inconsistent remedy involving a contradiction of the grounds upon which he before proceeded.
2. **Insurance: DESTRUCTION OF PROPERTY: ELECTION OF REMEDIES.** Where the owner of a building obtains separate policies of insurance thereon, one covering loss or damage by fire or lightning, and the other by wind or tornado, and the building is wholly destroyed, partly by fire and partly by tornado, the amount written in one policy cannot be recovered under the provisions of the valued policy law on the ground that the building was wholly destroyed by the elements therein insured against, when it appears that the assured has demanded and obtained payment of the full sum written in the other policy upon the claim that such building was wholly destroyed by the elements therein insured against. Such claims being clearly antagonistic to each other, the election to pursue the remedy under one will be held to be a bar to the other.

APPEAL from the district court for Douglas county:
ALEXANDER C. TROUP, JUDGE. *Affirmed.*

I. J. Dunn and T. E. Brady, for appellant.

Stout, Rose & Wells, contra.

FAWCETT, J.

On the evening of Easter Sunday, March 23, 1913, plaintiff's dwelling-house was completely destroyed, partly by the terrible tornado which swept through the city of Omaha about 6 o'clock that evening, and partly by fire. On February 14, preceding the fire, plaintiff obtained from defendant a policy of insurance in the sum of \$2,000, insuring her building against loss or damage by fire or lightning. At the same time, and as a part of the same transaction, but for a separate agreed consideration, defendant also

Brady v. State Ins. Co.

issued to plaintiff a separate policy for the same amount, viz., \$2,000, covering the same property against loss by tornado. Two days after the destruction of the building plaintiff executed and delivered to defendant sworn proofs of loss under the tornado policy, in which proofs she stated: "The total insurance on said property, or any part thereof, at the time of the tornado, including the above mentioned policy, was two thousand dollars, and no more." She also stated in the affidavit that the "sound value" of the building was \$3,500; that the "total loss" thereof was \$3,500; that the "total insurance" on the building was \$2,000; that the "amount named in this policy" was \$2,000; and that she "claimed under this policy" \$2,000. Two days later, on March 27, the defendant paid the amount thus claimed in full. On the 8th day of November following she instituted the present action, to recover the amount stated in the fire insurance policy, above referred to. At the conclusion of the trial the district court directed a verdict for defendant. Plaintiff appeals.

The errors assigned are: that the court should not have directed a verdict for defendant; that the verdict is contrary to law, and not sustained by the evidence, but is contrary thereto. The petition is in the usual form. The answer denies generally all allegations of the petition, except as to the corporate capacity of defendant and the issuance of the policy sued upon, and pleads, specifically: (1) That by the terms of the policy it was provided that, "if a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease;" that the building was blown down and destroyed by tornado, so that it fell, not as the result of any fire or lightning, but solely as the result of wind and tornado; that there was no loss or damage to the building by fire or lightning prior to the time it fell as a result of the tornado; that the liability of the defendant, under the terms of the policy, immediately ceased the moment the building fell as the result of the tornado; and (2) that, concurrently with the execution of the fire

policy, and for a like term and amount, and upon the same property, defendant issued to plaintiff a tornado policy; that on March 23 the house was totally destroyed by wind and tornado. The answer also sets out the presentation of sworn proofs of loss under the tornado policy and settlement as above set forth, and alleges that by reason of the premises plaintiff is "barred and estopped from claiming that the said dwelling-house was not totally destroyed by tornado and wind, and from claiming that the same was destroyed or damaged by fire or lightning."

Plaintiff testified that on the evening in question she was on the back porch of the house, and saw the tornado approaching at a distance of about a block, and then observed flames, from 4 to 6 or 7 inches long, in a number of places along the roof of the porch, where the electric wires were fastened; that the tornado struck the house (which must have been practically immediately), moving it bodily about 10 or 12 feet north and a little to the west, where it stood partly on the foundation and partly off the foundation, leaning a little because of the slope of the ground; that, when the storm had passed, the house was standing apparently in good shape, except as described, and except the front porch, which was somewhat dilapidated, and possibly some windows broken; that the fire had increased in the meantime, and could be seen at the back of the house by looking through the front windows; that the house continued to burn with more or less force, depending upon how hard it rained; that, when she left there at the end of that time, the house was still standing, but burning generally all over; that, when she next saw the place, the following day, the house had been entirely burned and nothing but ashes and noncombustible portions of the house and furniture remained on the former site of the house.

Richard Brady (plaintiff's son) testified that, as soon as he reached the cellar, the house moved from over them and the south and west foundation walls of cement fell in on top of them; that, as soon as the storm passed, he climbed out from under the debris and out of the cellar;

that the house had been moved about 10 or 12 feet north and a little to the west; that it tilted a little on the foundation because of the slope of the ground; that the roof was still on the house and the house intact, except the front porch, which was somewhat damaged; that he did not go into the house, but could see things inside, which appeared to be all right; that the house was on fire generally; that when he left the house it was still blazing, most of it standing, except the back wall; that the next morning nothing was left but ashes and pieces of iron and portions of some bedsteads.

R. H. Randall (plaintiff's father) testified that he was a carpenter and contractor; that he built the house for plaintiff four years before the tornado, and described the character of the house. He testified that it would cost from \$3,000 to \$3,600 to construct one like it; that after the tornado had passed all of the north side of the west gable of the house was burning rapidly and flames were coming out of the roof in several places; that the house seemed to be in good condition, the roof and sides all there, but the roof of the porch seemed to be gone, and the house was tilted some because of the slope of the ground; that the sides of the house were all right, except leaning over; that it continued to burn until past midnight, when it was all burned up.

This is substantially all of the evidence that was given as to the condition of the house immediately before and immediately after it was struck by the tornado. Taking this testimony as true, it clearly establishes that but little damage was done to the house by the tornado, and that its total destruction was due to fire. In the light of this testimony, if there had been no fire the loss which defendant would have been compelled to pay, by reason of the tornado, would have been a nominal amount as compared with the amount of the insurance. Under this testimony, the defendant would not have been liable under the valued policy law for the destruction of the building, as it had not, by reason of anything which had been done by the tornado,

lost its distinctive character as a dwelling-house. It was still resting partly upon the foundation, and it would not have been a difficult or expensive matter to have replaced it squarely upon the foundation and repaired the slight damage shown. It is hard to understand why plaintiff would sign proofs of loss for a total loss by the tornado, even though those proofs may have been prepared by a representative of the defendant, unless she fully understood that the limit of defendant's liability under both policies was the sum of \$2,000. That being true, then it mattered not to her, nor to the defendant, whether the sum of the insurance was paid to her under the one policy or the other, and this brings us to the controlling question in the case.

Under the valued policy law of this state, when insurance is written to insure real property against loss by fire, tornado, or lightning, and the property shall be wholly destroyed without criminal fault on the part of the insured, "the amount of the insurance written in such policy shall be taken conclusively to be the true value of the property insured and the true amount of loss and measure of damages." Rev. St. 1913, sec. 3210. What was the amount of insurance written by the defendant under its two policies issued February 14? Was it \$2,000 under each policy, making an aggregate of \$4,000 under both, or did the amount stated in one policy constitute the value of the property to be insured, as contemplated by the contracting parties? and was the tornado policy merely an incident to and a part of the fire policy, so that \$2,000 in all was the sum upon which the minds of the parties met as the sum which should constitute plaintiff's indemnity in case of her loss of the building by any of the contingencies insured against? We think it is a matter of common knowledge, not only among insurers, but with the insuring public, that insurance for a certain sum against loss or damage by fire or lightning, and for the same sum for loss or damage by tornado, is understood and intended to mean that the insurance by the second policy is not for a sum in

addition to the first, but is the assumption by the insurer of risk from elements not covered by the first policy. When a fire policy is taken on a building, it is not unusual for the insurer to grant additional protection against loss or damage by tornadoes by what is called a "rider" attached to the fire policy, in which the insurer, for a certain additional amount of premium, assumes the risk for damage by tornado; the amount of this additional premium being based upon the extent to which the insured desires the insurer to assume this additional risk. In such a case, it surely would not be claimed that under the valued policy law the insurer could be held liable for both amounts; this, for the reason that the assured can only recover under the provisions of the valued policy law when his building is "wholly destroyed," and, as it could not be wholly destroyed by fire and also wholly destroyed by tornado, there would be no theory upon which the assured could recover under both. The case is entirely different from where two or more insurance companies, each with the consent of the others, write a specific amount of insurance upon a building covering the same liability. In such a case we concede that this court, following other courts, has held: "Where several concurrent policies of insurance upon real property have been written with the consent of the respective companies, and the property insured is wholly destroyed by fire, each company is liable for the full amount of its policy." *Home Fire Ins. Co. v. Weed*, 55 Neb. 146, 151.

That those cases apply only where the several companies assume the same character of risk is made plain by a simple illustration. Suppose two different companies had insured plaintiff's building, company No. 1 against fire or lightning for \$2,000, and company No. 2 against tornado for \$2,000. Is there any possible theory upon which plaintiff could have recovered from both of those companies under the valued policy act? Clearly she could not. Why? Because the building could not have been "wholly destroyed" by the fire and "wholly destroyed" by the tornado. If one of these elements wholly de-

Brady v. State Ins. Co.

stroyed the building, the other element certainly could not have wholly destroyed it. In such a case, the burden would have been upon plaintiff to show which of the elements wholly destroyed her property. If she proved that it was wholly destroyed by fire, company No. 1 would have to pay the loss, and company No. 2 would have no liability. If the evidence showed that it was wholly destroyed by the tornado, the situation of the companies would be exactly reversed. We are unable to see any difference between a case where two such policies were written by two different companies, and where they were both written by one. The testimony in the case before us shows, as above stated, that the building was not much damaged by the tornado; yet plaintiff recovered the full sum of \$2,000 under the tornado policy on the theory that the building had been wholly destroyed by the tornado. In doing so, she collected a sum largely in excess of what she now says was her actual tornado loss. Under her present testimony, she collected from defendant money which she was bound to know she was not entitled to receive. She should not be permitted to make a false claim and collect it, and then assert the reverse of that claim at a later day, and, when her right to do so is challenged, invoke the strong arm of the law to enable her to enforce it. By asserting a total loss by tornado and collecting the full amount of the policy on the strength of her assertion, she has barred the door of inquiry as to the actual damage by tornado against the defendant. That defendant never intended to assume more than \$2,000 liability on her building under both policies is too plain to require discussion, and that she so understood it is equally clear. Defendant knew that it was liable for the amount it had assumed, and it was justified in paying it under either policy upon demand; but there is no reasonable theory upon which it should be required to pay the full amount under each. This would be to make a new contract for the parties and compel defendant to respond in double the amount that either party contemplated

when the contract was entered into. If plaintiff's house was on fire when the tornado struck it, either from a stroke of lightning or from defective wiring, and the fire continued to burn, notwithstanding the shock from the tornado, until it consumed the building, it is possible that plaintiff would have been entitled to recover for a total loss under her fire policy, in which case it would have been error to refuse to submit the question to the jury. If such a case had been presented, then the clause in defendant's policy, which provides that, "if a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease," would have been a proper issue to be also submitted to the jury. But that is not the case we have before us. In the case under consideration, plaintiff is relying upon the valued policy law. She relied upon the statute in collecting the full amount of the tornado policy. She now relies upon the same statute to collect the full amount of the fire policy. As we have already shown, she did not have a single remedy under both policies. Conceding that she had a remedy under either, she would be required to make her election. She made this election promptly, two days after the fire, by asserting her remedy under the tornado policy.

As held in *Dyckman v. Sevaton*, 39 Minn. 132: "One who has voluntarily chosen and carried into effect an appropriate legal remedy, with knowledge of the facts and of his rights, will not, in general, be allowed to afterwards resort to an inconsistent remedy, involving a contradiction of the grounds upon which he before proceeded."

In *Turner v. Grimes*, 75 Neb. 412, 416, after quoting from the opinion in the Minnesota case, we added: "To sustain the present action requires a negation of the facts set forth in the petition in the first action, and having assumed a certain position in this litigation, and having vexed the defendant with a lawsuit based thereupon, he cannot now be permitted to change his position and

Richards v. Chicago, R. I. & P. R. Co.

harass the defendant with another action based upon another and totally different theory.”

The language there used by Mr. Commissioner (now Judge) Letton exactly fits the case at bar. To sustain the present action requires a negation of the facts set forth in plaintiff's proof of loss under her tornado policy, and, having assumed the position then that defendant was liable for the full amount of her insurance under the tornado policy and obtained the same from defendant upon that claim, she cannot now be permitted to change her position and harass the defendant with an action based upon another and totally different theory, viz., that her house suffered little damage from the tornado, but was wholly destroyed by the fire.

The judgment of the district court is right, and it is

AFFIRMED.

ROSE and SEDGWICK, JJ., not sitting.

J. RICHARDS, APPELLANT, v. CHICAGO, ROCK ISLAND &
PACIFIC RAILWAY COMPANY, APPELLEE.

FILED DECEMBER 9, 1916. No. 19080.

Assignment of Wages: VALIDITY. A power of attorney granting authority to assign wages, made previous to the existence of a contract of employment, is ineffectual to authorize such an assignment in the future and after a contract of employment has been entered into by the maker.

APPEAL from the district court for Douglas county:
CHARLES LESLIE, JUDGE. *Affirmed.*

J. E. von Dorn, for appellant.

W. D. McHugh, W. H. Herdman, E. P. Holmes and Guy C. Chambers, contra.

Richards v. Chicago, R. I. & P. R. Co.

FAWCETT, J.

Plaintiff brought suit in the district court for Douglas county to recover \$75 claimed to be due by reason of an assignment of the wages of one Lawrence B. Savage. From a judgment in favor of the defendant, plaintiff appeals.

There is no issue of fact involved. In May, 1912, Savage, who was not then in the service of defendant company, executed to one Morgan a power of attorney, in and by which he empowered him, at any time thereafter when Savage should be indebted to plaintiff, to execute and deliver to plaintiff an assignment of any wages, commissions or other moneys due or to become due him from any person, firm or corporation, within one year from the date of the instrument. Savage did not enter the service of the defendant company until August 3, 1912, and his services with the company terminated on September 5, 1912. On August 27, 1912, Morgan, as attorney in fact for Savage, executed an assignment to plaintiff for all sums of money then due or to become due to Savage from the defendant company not to exceed \$81, and on the next day counsel for plaintiff served notice of such assignment on defendant. Defendant refused to pay, and this action was instituted. The answer of defendant shows that during the term of Savage's service he earned \$62.98 in August and \$14.70 for the five days in September, but alleges that the pretended assignment was null and void, for the reason that it was executed by an attorney in fact under a pretended power of attorney executed long prior to the time when Savage entered the employ of defendant. This presents the question of law involved. The district court very correctly held the assignment void, and entered judgment for defendant.

The rule is correctly stated in *Richards v. Inter Ocean Newspaper Co.*, 181 Ill. App. 515, as follows: "(1) A power of attorney to make an assignment of wages given by an employee, to plaintiff, cannot authorize plaintiff to make an assignment which will be valid against defendant a subsequent employer with whom the employee

Underwood v. Chicago & N. W. R. Co.

had no contract at the time the power of attorney was executed. (2) An assignment of wages to be earned in the future from employers with whom the assignor has no contract of employment at the time of making the assignment is invalid." The same rule is announced in *Ogle Co-operative House Furnishing Co. v. Shauman*, 188 Ill. App. 4, and in *Blakeslee v. Make-Man Tablet Co.*, 175 Ill. App. 515. Any other rule would be contrary to the clear weight of authority and against public policy.

AFFIRMED.

HAMER, J., not sitting.

HERBERT J. UNDERWOOD, APPELLEE, v. CHICAGO & NORTH-
WESTERN RAILWAY COMPANY, APPELLANT.*

FILED DECEMBER 9, 1916. No. 18949.

1. **Costs: STATUTORY PROVISION.** Section 8168, Rev. St. 1913, provides that, when an action is begun in the district court which should have been tried before a justice of the peace, the plaintiff cannot recover the costs of the trial in district court.
2. ———: **TAXATION.** It is the duty of the court in which the action is tried to determine whether the action is of such a nature that it was properly brought in that court, and if the judgment in that court is of such a nature as to justify a recovery of costs by plaintiff, and costs are so adjudged, this court will not retax such costs upon appeal, although a remittitur is required reducing the judgment to an amount within the jurisdiction of a justice of the peace.
3. ———: **COSTS ON APPEAL.** The costs in this court upon appeal are the same whether the action was begun in justice court or in district court, and the taxation of costs of this court are not governed by that statute.
4. ———: ———. Upon appeal to this court, if the appellant recovers a better judgment than the one appealed from, he is entitled to costs of this court, unless the court for special reasons otherwise orders.

*See opinion, *ante*, p. 275.

Underwood v. Chicago & N. W. R. Co.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. Motion to tax costs. *Sustained in part, and overruled in part.*

A. A. McLaughlin, Wymer Dressler and Lyle Hubbard,
for appellant.

Sutton, McKenzie, Cox & Harris, contra.

SÉDGWICK, J.

The plaintiff began this action in the district court for Douglas county and there recovered a judgment for \$374.36. Upon appeal to this court the plaintiff was required to enter a remittitur in the sum of \$194.93, which was accordingly done, thereby reducing the amount of the plaintiff's recovery to \$179.43, and interest from the date of the judgment, June 9, 1914, to September 21, 1916, at 7 per cent., amounting to \$208.25 in all.

The defendant has filed a motion in this case to tax the costs of the district court and the costs of this court against the plaintiff under section 8168, Rev. St. 1913. That section provides as follows: "If it shall appear that a justice of the peace has jurisdiction of an action and the same has been brought in any other court, the plaintiff shall not recover costs." The costs of commencing and the trial of an action in the district court are necessarily much larger than the costs of the same action in justice court, and the plaintiff who commences an action in the district court that might, and therefore ought to, be brought in justice court incurs a larger amount of costs than the proper prosecution of such an action would require. The purpose of this statute is to prevent the incurring of the unnecessary costs of the trial in the district court when the action might, and ought to, be prosecuted before a justice of the peace. Construing this statute according to its purpose and spirit, if the plaintiff causes the unnecessary additional expense of a trial in the district court when it might have been tried in the justice

court, he cannot recover the costs of that trial from the defendant.

When the recovery in the district court is beyond the jurisdiction of a justice of the peace, the plaintiff recovers his costs. The district court determines the question of costs in such case, and, if that court determines it correctly upon the record as it is before that court, this court upon appeal cannot say that the court erred in so doing.

The defendant construes the statute as though it read: "If, upon appeal, it shall finally appear or be determined that a justice of the peace has jurisdiction, and the plaintiff has recovered his costs in the trial court, the appellate court shall retax such costs against the plaintiff." It would seem more probable that the legislature intended that, if it appears upon the trial that a justice of the peace has jurisdiction, the plaintiff shall not upon that trial recover costs. The omission of the word "finally," which appears in the statutes of some states before the word "recover," is suggestive.

In an action to recover damages for negligence, the amount of the recovery is often so uncertain that to enforce the rule insisted upon by defendant would prevent a fair trial of the case. The injured party who recovers a judgment could not present and try the amount of his claim for damages without incurring the risk of being compelled to pay the costs of the trial of an issue that could not be satisfactorily tried in a court of inferior jurisdiction. It would seem that the statute is for the court in which the action is tried, and the determination by that court that the action is of such a nature as justifies bringing it in that court will enable the plaintiff to recover his costs of that trial. Moreover, if we should give this statute the literal and technical construction that the defendant contends for, it would appear that by the final order of this court the plaintiff recovers from the defendant a sum of money beyond the jurisdiction of the justice of the peace. The costs in this court are the same whether the action was begun in justice or district

Hoopes v. Creighton.

court. Therefore the taxation of costs in this court should not be controlled by this statute.

As the defendant recovered in this court a more favorable judgment than the judgment of the district court, and there was no finding by this court that the costs ought to be taxed against the defendant, we think that the defendant's motion to tax the costs of this court against plaintiff should be, and it is, therefore, sustained. The motion to tax the costs of the district court against the plaintiff is overruled.

JUDGMENT ACCORDINGLY.

WILLIS I. HOOPES, ADMINISTRATOR, APPELLEE, v. JOHN D. CREIGHTON, APPELLANT.

FILED DECEMBER 9, 1916. No. 18737.

1. **Negligence: ACTIONS: VIOLATION OF STATUTE.** The violation of any statutory or valid municipal regulation, established for the purpose of protecting persons or property from injury, is sufficient to prove such a breach of duty as will sustain a private action for negligence, if the other elements of actionable negligence concur. *Omaha Street R. Co. v. Duvall*, 40 Neb. 29.
2. **Innkeepers: DUTIES TO GUESTS: FIRE ESCAPES.** A hotel owner may not omit to do the things that are reasonably necessary for the safety and protection of the guests of the house, and if he disregards the provisions of the law concerning the establishment of fire-escapes upon the building, and such other devices as the law provides for, he will be held liable for the damages sustained because of the death of any guest which may be brought about by his negligence.
3. **Negligence: ACTIONS: VIOLATION OF STATUTE.** The fact that the statute or ordinance in question does not in terms impose a civil liability for its violation does not affect such evidence of its violation as may go to show negligence.
4. **Innkeepers: ACTION FOR NEGLIGENCE: TRIAL: INSTRUCTIONS.** A requested instruction of the defendant, to the effect that the plaintiff's decedent assumed the risk of injury because he knew the dangerous condition of the building as regards injury by fire, was properly refused.

Hoopes v. Creighton.

APPEAL from the district court for Douglas county:
ALEXANDER C. TROUP, JUDGE. *Affirmed.*

Mahoney & Kennedy and Yale C. Holland, for appellant.

Brown, Baxter & Van Dusen and Gurley & Fitch, contra.

HAMER, J.

Appeal from the judgment of the district court for Douglas county. Willis I. Hoopes, as administrator of the estate of Renfree H. Rickard, brought an action against John D. Creighton to recover damages because of the alleged negligence of said Creighton in maintaining a hotel in the city of Omaha, known as the "Dewey Hotel," and in which he failed to furnish fire-escapes for the said building as prescribed by the statute of the state of Nebraska. The plaintiff recovered a judgment for the sum of \$6,000.

The plaintiff alleged that Renfree H. Rickard died at Omaha, Nebraska, February 28, 1913, leaving as his next of kin his widow, Clara Rickard, and his father, Peter H. Rickard; that John D. Creighton was the owner of the Dewey Hotel, the same being used by and held out to the public as a hotel and public lodging place; that said building was maintained without having one or more fire-proof stairways; that the defendant negligently failed to provide any fire-escapes to which convenient access could be had from the interior of said building on the second floor, and with only one insufficient fire-escape stairway and platform on the north side, and one standpipe and ladder on the east side, neither of which was of convenient access from the interior of the building; that the way of egress to such fire-escapes was at all times obstructed by solid doors of wood with locks and bolts attached thereto, and maintained between the only fire-escapes on the second floor; that the defendant failed to equip any outside rooms with automatic fire-escapes or device so as to

Hoopes v. Creighton.

offer the means of escape to the occupants who might be unable to reach such defective fire-escapes as were maintained; that the defendant, shortly before the fire, was notified by the deputy labor commissioner to provide fire protection and to remedy the said defects as required by law; that on February 28, 1913, said Rickard, as a guest of the said hotel, was assigned to room No. 34, an outside room that was not equipped with a fire-escape ladder or other device for the safety of the guests, and that said Rickard did not know the condition of the premises and the lack of proper fire-escapes; that shortly after said Rickard retired a fire broke out in the said hotel, and solely by reason of the failure of defendant to provide fire-escapes said Rickard lost his life; that said Rickard at the time of his death was a strong, well-educated man, 37 years old, operating as a brand inspector and a trainer and trader of horses at the South Omaha stock-yards, earning more than \$5,000 a year, and contributing large sums of money to his father, as well as supporting his home for his wife and himself.

The defendant admitted that he was the owner of the said Dewey Hotel building, and denied the other averments of plaintiff's petition. He alleged that whatever injuries plaintiff's decedent had received were occasioned solely through the failure and negligence of said defendant, who was familiar with the conditions and surroundings of said hotel building and assumed whatever risk there was; that the premises were purchased by the defendant February 6, 1907, subject to a lease made to one Charles E. Wilkins, and were then and at all times subsequent thereto equipped with fire-escapes adequate and sufficient in number and design, and with a free and unobstructed access thereto from all parts of said building, and that said fire-escapes and the means of access thereto were then, and at all times subsequent, maintained as required by law; that the lessee had complete possession of the premises at the time of the fire, and that the defendant had no control over the said building and took no part

in its use and management. The reply was a general denial.

The evidence sustains the allegations of the petition and supports the verdict. It was in testimony by the night clerk, Nold, that on the night of the fire the door leading to the fire-escape on the second floor opened into a guest room, No. 30. This is also shown by the plan of the second story contained in the record. The fire-escape at the north end of the building, such as it was, could be reached from room No. 40 through the window furthest west. Room No. 40 was a guest room and had a door leading into it from a corridor which extended the length of the building. A person could go from this corridor through and into this guest room and then through a window to the fire-escape at the northeast corner of the building. This fire-escape would permit him to reach a ladder, which, when unhooked from the wall where it usually hung, extended a short distance below the floor of the second story. It was not unhooked the night of the fire, and the occupants of room No. 40, Clara Newman and Iona Jennings, went down the fireman's ladder. The photograph of the north end of the building shows that this fire-escape could be reached from the second window from Thirteenth street and "from the ledge along the front of the building under the window." The "ledge" or "cornice" referred to on the north end of the structure was practically on a level with the second floor. The north fire-escape went clear up onto the roof. Access to the north fire-escape could be had from the second story by going through the window at the north end of the corridor and then crawling along on the "cornice" or "ledge" toward the northeast corner of the building until it was reached. Of course, an athlete might have walked along on this ledge. No one seems to have escaped from the second story by means of these fire-escapes. There was a ladder on the east side which did not extend very far toward the ground. It could be reached from the second floor through room No. 30.

Hoopes v. Creighton.

Nold testified that every room on the second floor was provided with a lock and key, and that each guest assigned to a room on that floor was provided with a key. The testimony of Nold is corroborated by the testimony of Garrett F. Vliet, who was also one of the clerks of the hotel. Vliet testified that room No. 34 was occupied by Rickard, the decedent, and the woman whom he registered as his wife. He also testified that rooms numbered 20, 28 and 32 of the second floor were not occupied that night, and that No. 30 was occupied by a Charles Cummings. His testimony corroborated that of Nold concerning the fact that Iona Jennings and Clara Newman occupied room No. 40. He testified that Rickard was under the influence of liquor when he and the woman came in; that it was about 3 o'clock in the morning when they came; that the woman appeared to be intoxicated; that Rickard was able to walk, and that he did not stagger noticeably; that the witness assigned him to room No. 34, the fourth room from the north on the east side of the hallway, on the second floor; that this was the last time the witness saw him alive; that none of the outside rooms was equipped with an automatic fire-escape; that after calling the fire department the witness called Mrs. Wilkins and her sister; that the witness met Mr. Nold before he got out of the building, and that Nold had apparently been crawling; that the witness met him about one-third of the way up from the vestibule to the office.

The defendant, John D. Creighton, testified that at the time he bought the building the fire-escapes were there which we have described; that the fire-escape on the north end was a regular iron fire-escape, the steps being of cast iron and 5 inches wide and 27 or 28 inches long; that when he put in a new front he was given permission to come out with the "cornice" or "ledge;" that this "ledge" was 26 inches wide by 44 feet long, and was at the level of the second floor; that it was made of wood and covered with tin; that it ran clear across the width of the hotel; he also described the fire-escape at room No. 40 on the north

Hoopes v. Creighton.

end of the building and also the ladder fire-escape on the east side at room No. 30. The testimony concerning the fire-escapes, such as they were, is corroborated by the testimony of other witnesses. Alexander Beck testified that the platform on the second floor, being the one at room No. 40, could be reached by going out through the hall window and walking along the "ledge."

C. S. Ely testified that the door from room 34, the one occupied by Rickard, opened into the corridor, and that there was a chance to go through the window at the north end of the corridor onto this "ledge," or that one could go south along the corridor and then go down the winding stairway which led from the office to the entrance on Thirteenth street, or that one could come out of the room No. 34 into the corridor, and then go south to room No. 30, and then go, if possible, down the ladder fire-escape which might be reached from that room.

Baker Cole testified that he was a city fireman at the time of the Dewey Hotel fire; that his company, Hook & Ladder No. 1, was one of the first on the ground; that the company got there about 4:48 a. m.; that the witness was acquainted with Rickard; that the witness went into the Thirteenth street entrance; that the building was very smoky at that time; that Rickard was the first man that the witness got hold of, and that he dragged him out and called for help; that he was then alive; that he was inside the door when the witness found him, but "plumb" down the stairway; that it was absolutely dark in there in the entrance-way when the witness found Rickard; that the witness and others took Rickard to a restaurant.

Martin Dinenn testified that the first alarm came at 4:44 a. m.; that the second alarm came at 4:47, and the third alarm at 4:52; that this last alarm was turned in immediately after the second explosion; that the witness got there about 4:51 and was on the ground floor when the second explosion occurred; that he saw a ladder going up to the second floor, and that he went up on that ladder

Hoopes v. Creighton.

and into a bedroom, and then out into the hall; that about that time the explosion came and he got out as fast as he could; that after the witness was dragged out from upstairs he met some firemen on the sidewalk, and they said somebody was inside the entrance; that the witness went into the doorway of the entrance and found the Lee woman on the floor; that she was then alive, and the witness called for help, and they pulled her out and took her to a restaurant. The woman described by the witness was the woman who occupied room 34 with Rickard. Both appear to have died.

F. E. Hodges, called as a witness for the defendant, testified that he was night manager of the Calumet restaurant; that he waited on Rickard the night of the fire between 2 and 3 o'clock in the morning; that he had a woman with him; that he staggered; that the woman was probably intoxicated, but that Rickard was well able to handle himself, although he staggered some both going out and coming in.

No fire-escape constructed for the second floor was made in compliance with the statute. No fire-escape was built on a level with the floor of the second story "and of sufficient length to permit access to the same from not less than two windows," nor were they "so constructed as to be of convenient access from the interior of the building," nor were they "commodious in size and form and of sufficient strength to be safe for the purpose of ascent and descent," all as provided by the statute, nor did any outside room of said hotel contain an automatic fire-escape or other proper and sufficient device to escape from a fire. The provision of the statute (Laws 1911, ch. 56, sec. 1) "that in every hotel, boarding, lodging, tenement, or apartment house, there shall also be provided one automatic metallic fire-escape, or other proper device, in every outside room of such hotel, boarding, lodging, tenement or apartment house, each automatic metallic fire-escape or device to be attached to the inside of said rooms so as to afford an effective means of escape to all occupants who,

Hoopes v. Creighton.

for any reason, are unable to reach or use the said fire-proof stairways, chutes, or toboggans," was entirely disregarded. The law also provides: "The way of egress to such fire-escapes shall, at all times, be kept free and clear of all obstructions of any and every nature." Laws 1911, ch. 64, sec. 14.

The appellant complains that the court erred in giving instruction No. 3 to the jury. That instruction simply states the law as it is contained in the Laws of 1911 above cited. If the law is wrong and without foundation, then the instruction is wrong. The first part of the instruction provides for the building of fire-proof stairways, chutes or toboggans, and steel platforms and automatic metallic fire-escapes. The second provision, to the effect that "the way of egress to such fire-escapes shall, at all times, be kept free and clear of all obstructions of any and every nature," is contained in the section last above referred to. The law is contained in two provisions of the statute. After a careful examination of appellant's brief, we are unable to discover anything wrong with the third instruction given by the court upon its own motion. We do not copy it for the reason that it is itself a copy of the law.

The Reagan act seems to be a complete law touching the matters within it. It contemplates protection against fire. It is made to apply to hotels, boarding houses, store houses, tenement houses, and every building used in whole or in part as a public building, or used as an office or store building or schoolhouse or theatre or public hall or place of assemblage. We see no constitutional inhibition against the passage of the act. There is a provision looking to the inspection of any building in the state where it is claimed that the provisions of the act are violated. The inspection is to be by the commissioner of labor, the deputy commissioner of labor, or such other person as may be appointed by the deputy commissioner of labor. There is also a provision touching the payment of compensation for services. The act winds up by certain provisions with respect to the punishment of those who violate it, and it

Hoopes v. Creighton.

is made the duty of the county attorney to prosecute the persons who violate the law before any court of competent jurisdiction. The act was no doubt intended to provide whatever might be necessary. The act introduced by Mr. Bulla looks to the creation of a hotel commission, and then there are certain regulations concerning the lighting and plumbing and water closets, and then the pillow slips and sheets and bedding and the wash room and towels, and in section 14 there is the provision that within six months after the passage of the act every hotel in the state more than two stories high shall be equipped with an iron fire-escape on the outside of the building. These provisions, which may not be more specifically set forth because of unduly extending this opinion, are in no way in conflict with the Reagan act. It seems to look toward the enforcement of the provisions contained in the Reagan act, together with certain additional duties that are imposed upon the hotel-keeper. In the Reagan act the provisions are intended to apply to a large class of buildings, not hotels alone, but seven or eight other different classes of buildings. It is said that the Reagan act is void for the reason that it undertook to prescribe fire-escapes for hotels. We are unable to see any good reason why the Reagan act is void. Many authorities are cited, but they do not seem to contain the reason contended for.

In *Board of Education v. Moses*, 51 Neb. 288, which is cited by counsel for appellant, it was held: "An act of the legislature which is clearly amendatory of an existing statute is unconstitutional when such amendatory act in no way mentions or describes that of which it is amendatory." The purpose of the act was to make the public high schools of the state open to attendance of any person of school age residing outside the district, being a resident of the state, and whose education cannot profitably be carried further in the public school of the district of his residence. It was held that the fundamental law of the state required all

Hoopes v. Creighton.

the parts of an amended law to be incorporated into the act, and the old law so amended to be repealed. We are unable to see any similarity between the case cited and the instant case.

In the case of *State v. Majors*, 85 Neb. 375, it was held that an amendment by implication repealed section 22, subd. XIII, ch. 79, Comp. St. 1907, and that it did not contain the section as amended, or purport to repeal the same. This would be a very different case from the one under consideration. Here is a complete act, if we understand it aright, and it stands on its own legs without being an attachment to anything.

In *Minier v. Burt County*, 95 Neb. 473, it was said in the syllabus: "An act of the legislature, which is complete in itself, does not violate section 11, art. III, of the Constitution, which provides: 'No law shall be amended unless the new act contained the section or sections so amended and the section or sections so amended shall be repealed.'" In that case, however, it was held that the amendment did not contain the section or sections amended, nor repeal them.

In *Stewart v. Barton*, 91 Neb. 96, it is said in paragraph 2 of the syllabus: "Where an act is passed as original and independent legislation and is complete in itself so far as applies to the subject-matter properly embraced within its title, the constitutional provision respecting the manner of amendment and repeal of former statutes has no application." That was a case where the legislature provided for the construction and equipment of a laboratory on the campus of the medical college of the university of Nebraska at Omaha under the supervision of the board of regents. Laws 1911, ch. 205. There was an effort to defeat the act. It is said in the body of the opinion: "We think it cannot with reason be contended that the legislature has not the authority to enlarge by a separate and subsequent act the powers and duties of any officer of its own creation, nor that it cannot widen or relax by later enactments any building limitations it may have estab-

lished. The provisions of the general act limiting the powers of the regents with regard to the erection of other university buildings was not interfered with by the new act, but it conferred additional powers and prescribed a different location for another building; while, in some sense, supplemental to the former act, it leaves its general provisions untouched and therefore is not amendatory in the proper sense. * * * Where an act is complete within itself, it may be valid even though in conflict with a prior law not referred to in the later act"—citing *State v. Cornell*, 50 Neb. 526; *Affholder v. State*, 51 Neb. 91; *Zimmerman v. Trude*, 80 Neb. 503; *Allan v. Kennard*, 81 Neb. 289; *State v. Ure*, 91 Neb. 31.

The second reason given why there should be a reversal of the judgment is that the Reagan act is not germane to the chapter and section which it purports to amend and repeal. The section referred to provides with respect to the commissioner or his deputy that either shall have a right to enter any factory or workshop in which labor is employed for the purpose of gathering facts and statistics, or examining the means of escape from fire, and the provisions for the health and safety of operatives. As we have said before, this Reagan act is not intended as an attachment to any other provision; it purports to be, and is, of and in itself, a complete act. We have examined some of the cases cited in support of the contention made. Among others is *Armstrong v. Mayer*, 60 Neb. 423. In that case this court held that the supreme court had jurisdiction to review by proceeding in error a judgment rendered by the district court without jurisdiction of the subject-matter. We are unable to see the force of counsel's contention.

In *Strahl v. Miller*, 97 Neb. 820, this court said, in an action for damages against a hotel keeper: "This (provision of the law of 1883) is sufficient to attach a civil liability to the innkeeper for negligence in not properly safeguarding his guest."

Hoopes v. Creighton.

In *Rose v. King*, 49 Ohio St. 213, the court said: "Such liability followed as a consequence of the terms of the original act in which the language above quoted does not appear, but which enjoined the duty, and resulted from the principle, which we supposed to be of universal application, that where a statute imposes a duty but gives no penalty to the party aggrieved by its nonperformance, that party is entitled on common law principles, to maintain an action for his damages." In support of the position stated, the Ohio court quotes from Wharton, Law of Negligence, sec. 443, and many other authorities.

In *Yall v. Snow*, 201 Mo. 511, there was an action for damages for neglect of the owner to provide fire-escapes in accordance with the statute. The court held that there was a right of action for death of the guest in the hotel building not equipped with fire-escapes in accordance with the statute. In this case the defense was that the building then used for a hotel, was not constructed for a hotel, and therefore that the owner was relieved from the duty of placing fire-escapes on the building. It was held that the defense could not be maintained, and that it was the duty of the owner, if he leased the building for hotel purposes, to put the fire-escapes on.

The third proposition contended for by the appellant is that the judgment should be reversed because of the misconduct of counsel. We may say that there are a good many cases on this subject, and several of them are cited. As we look at the matter, much of the trial consisted of a battle of words. Upon the part of the plaintiff it was contended that the Dewey Hotel was kept in order that the defendant might make money out of prostitutes who used the hotel for the accommodation of themselves and their male companions. On the other hand, it was contended by counsel for the defendant that the decedent himself was living with a prostitute, and therefore that the case was not a proper one in which to give the plaintiff damages. We think that it was about an even case of mud throwing, probably found by both parties to be necessary

Hoopes v. Creighton.

because of the exigencies under consideration. We do not indorse this manner of trying the case, and it is certainly open to censure; but, where both parties use the same sort of weapons, we do not feel like setting the judgment aside. Each appears to have shown unusual skill in this line of argument; but, after all, as one of the counsel expressed it in the brief, it is a case of the pot calling the kettle black. The affidavit of defendant's counsel touching the misconduct of plaintiff's counsel was made on memory, and there was no stenographic report of what was said. This makes an uncertain element in the case. In the *City of Lexington v. Kreitz*, 73 Neb. 770, it was held that there was no probability that the language used by plaintiff's counsel in any manner influenced the verdict. In this case the decedent was shown to be a man of large earning capacity. He was a brand inspector for the state of Montana and received a regular salary of \$1,800 a year. He was also a horse trainer and trader on the South Omaha market. He left a widow and a father surviving him. The judgment was only for \$6,000. The remarks of Mr. Woodrough do not seem to have done the defendant an injustice, so far as the verdict and judgment are concerned. The jury could not have been carried away by passion or prejudice.

The building was not equipped with fire-escapes as required by the statute. The evidence clearly shows that this neglect was the proximate cause of Rickard's death, and the defendant is liable in damages. There was no access from either of the hall windows of the second floor to any fire-escape. There was a door to be broken through in order to reach the window and fire-escape in room No. 34. They were shut in. Apparently they had opened the door into the hall and struggled to go to the bottom of the entrance on Thirteenth street. On their way there they were overcome by smoke, and gas, and heat, and they died because of it. Four persons besides Rickard lost their lives in this fire. The evidence shows that the owner of the building had been notified, and he must have been

Hoopes v. Creighton.

aware of the fact. He took the risk by neglecting to equip the second story as the law provides.

The requested instruction of the defendant, to the effect that Rickard assumed the risk because he knew the dangerous condition of the building, was properly refused. Rickard did not assume the risk because he stopped at the hotel. We are cited to *Armaindo v. Ferguson*, 55 N. Y. Supp. 769, where it is said: "By staying at a hotel for six months, paying weekly rent, without objecting to a failure to provide the room with a rope or other appliance for escaping in case of fire, a guest waives the provisions of section 40, ch. 376, Laws 1896 (Domestic Commerce Law), requiring the hotel-keepers to provide each lodging room with a rope or other appliance sufficient to enable the guest to escape in case of fire." In that case there were, it is said, fire-escapes, "and the platform to one of them was directly under one of the windows opening out of the plaintiff's room." The plaintiff seems to have kept her window nailed down to prevent unbidden persons from entering her room. She could have opened the window and could have gone down the fire-escape. The man who occupied the room with her escaped from the burning building by means of this fire-escape. The woman failed to use it, through fear or confusion, and jumped to the ground. As there was ample means of escape the proprietor of the building was not held liable.

We are also cited to *Huda v. American Glucose Co.*, 154 N. Y. 474. In that case there were fire-escapes constructed on the outside of the building. There was a provision in the law that the fire-escapes should have landings "embracing at least two windows at each story and connecting with the interior by easily accessible and unobstructed openings." The building was a factory. The court tells in the opinion that, to conduct the business of the factory, the manufacture of glucose, it is necessary to keep the windows nailed close and to maintain an even temperature. The windows were screwed down. The court seems to have taken the view that as the windows

Hoopes v. Creighton.

were slight they could have been easily broken, and that when the fire broke out it was the duty of the employees, if they wished to save themselves, to smash the windows and get out on the fire-escapes.

In *Willy v. Mulledy*, 78 N. Y. 310, the court said: "It was the intention of the statute that they (the tenants) should have two means of escape in case of fire, one by the scuttle (through the roof), and another by the fire-escape. It was the duty of the defendant to provide a ladder, and then to use reasonable care to keep it there in readiness for use." The court held that it was the duty of the proprietor to keep a ladder so that the tenants might reach the scuttle, and that it was his duty to build and maintain a fire-escape. He was held liable for the death of the plaintiff's wife and child.

In *Cittadino v. Schackter*, 83 N. J. Law, 593, the plaintiff, a widow, was tenant of the top floor of an apartment house for more than a year at the time of its partial destruction by fire. She endeavored to escape and was injured. It was held: "Even though the plaintiff had discovered that the landlord failed to perform his statutory duty, she might reasonably assume that he would perform that duty at any time and not continue to disregard the law."

Aldermen cannot dispense with a requirement for fire-escapes on a factory building. *Maiorca v. Myers*, 115 N. Y. Supp. 923. Such fire-escapes as may be deemed necessary by the fire inspector shall be provided on the outside of every factory three or more stories high. *Arnold v. National Starch Co.*, 194 N. Y. 42.

In *McLaughlin v. Armfield*, 58 Hun (N. Y.) 376, the court had before it for construction section 16, tit. 14, ch. 583 of the Laws of New York, 1888, which directed that certain buildings "shall be provided with such fire-escapes and doors as shall be directed and approved by the commissioner." Held: "The duty rests upon the owner to bring the subject before the commissioner and obtain his direction in the premises; and, where an accident

Thornton v. Kingrey.

occurs because of the absence of such fire-escapes from the building, the owner cannot avoid responsibility by alleging that the statute does not declare absolutely that fire-escapes shall be erected by the owner."

When the legislature of Nebraska passed the acts referred to concerning fire-escapes, it was apparently determined that they should be put upon the kind of buildings named, and with a view of saving human life. There appear to be three expressions of the legislature touching the same subject-matter, the preservation of life by the use of fire-escapes. So far as the same can be done, the legislature of Nebraska has declared its wishes in the matter. The courts are not called upon to disregard the expressions of the legislature, when they have been frequently repeated, and all the time along the same line.

The judgment of the district court is

AFFIRMED.

MORRISSEY, C. J., and SEDGWICK, J., dissent.

HENRY M. THORNTON, APPELLANT, v. VERNON KINGREY ET AL., APPELLEES.

FILED DECEMBER 9, 1916. No. 18914.

1. **Waters: MUNICIPAL CORPORATIONS: IRRIGATION LATERALS IN STREETS.** A village having for years maintained a lateral ditch for irrigation purposes through one of its streets, a landowner who had irrigated his land through this ditch for a long time and based the irrigation system of his land on the fact that the water was received from such lateral cannot be deprived of his right by the village in the regulation of its streets, unless it furnish him another lateral through which he may obtain water from the same source.
2. ———: ———: ———. A village may in the exercise of its police powers require one entitled to the use of water for irrigation purposes to take the same through another lateral if it provide a suitable connection therewith without expense to the water user.

APPEAL from the district court for Scotts Bluff county:
RALPH W. HOBART, JUDGE. *Judgment modified.*

Thornton v. Kingrey.

Wright & Mothersead, for appellant.

Morrow & Morrow, contra.

HAMER, J.

Appeal from the judgment of the district court for Scotts Bluff county. There is not much, if any, dispute about the facts. The Gering irrigation district is the owner of a canal by means of which it supplies water to the lands within the said district. The canal which it owns runs west of the village of Gering. The plaintiff and appellant, Henry M. Thornton, owns a tract of land in the eastern part of the village of Gering, and his land is also embraced in the Gering irrigation district, of which it is a part. This land has for several years past been used solely for agricultural purposes. About ten years before the commencement of the action in this case the plaintiff and other landowners in the Gering irrigation district constructed an open ditch from the main canal of the irrigation district directly through O street to the tracts of land which were severally owned by them. The open ditch or lateral enters O street at its west end, and continues along said street to the eastern terminus thereof at a distance of about 16 feet from the curb line of the street. The ditch was constructed apparently without authority from the village, except as might be implied because no objection was made to the construction of the same. It might further be said that the village authorities undertook to supervise the distribution of water from this lateral, which was part of the distributing system of the Gering irrigation district. No one not an owner of land in the district had any right to use of the water conducted through said ditch, and no one had any right to the use of said ditch, except an owner of land in the said district. It is not claimed that the inhabitants of the village of Gering had any right to use said lateral except those entitled to water from the canal. It is claimed that the ditch was a private enterprise conducted only for the benefit of those entitled to water from the irrigation dis-

Thornton v. Kingrey.

trict, nor is it claimed that the lateral was in any manner connected with the municipal affairs of the village.

Before the commencement of this suit the village board caused the plaintiff to be notified that he must cease to draw water through said lateral for the irrigation of his land, but that he had permission to draw water through another lateral passing through a different street. Upon receiving this notice the plaintiff at once commenced this action to restrain the village board and its employees from preventing him from conducting water through said lateral in O street, alleging that it was the only lateral through which he could obtain water for the irrigation of his land. The court found that the land might be irrigated by means of another lateral, through which the plaintiff was to be permitted to conduct water upon constructing a small section thereof so as to connect said ditch with his land. There was a finding that the board of trustees of the village could not as a matter of law grant permission for the construction of said lateral, and the injunction prayed for was denied.

There is a contention by the appellees that the lateral in question did not become a part of the water-works of said village, and that the village was under no obligation to furnish water through said lateral to the plaintiff, or to permit the plaintiff to use it. Also that said lateral was constructed and maintained without any authority, and that it therefore constituted a nuisance which the village might abate at any time. Also that the power to abate said lateral carried with it the power to limit its use, and that the village board might, therefore, prevent the plaintiff, and as many others as they saw fit, from using said lateral. Also if said lateral was not a nuisance, and might be maintained as long as the village did not object, yet the power vested in the village board to regulate the use of the streets carried with it the power to require the removal of said lateral at any time, or to limit its use, as the board might deem advisable.

Thornton v. Kingrey.

It is contended by appellant that the lateral was really a part of the water-works of the village; that said lateral is for the purpose of carrying water from the canal of the Gering irrigation district to the lands of the plaintiff and others. It is not admitted to be proved that said lateral was ever used for municipal purposes. It is claimed that its use was strictly limited to the carrying of water for those who were entitled to receive the same from the canal of the Gering irrigation district, and not for any other purpose. It is claimed that this was not a business which the municipality had any right or authority to conduct.

It is contended that under the provisions of section 5119, Rev. St. 1913, the village had authority to conduct water in open ditches for the use of the inhabitants. If that proposition should be conceded, the question is raised whether it would aid the appellant in this case. It is contended by the appellees that, if the village had authority to conduct water through open ditches to its inhabitants for irrigation or domestic purposes, it could hardly be contended that it had authority to distribute water for the irrigation district. It is contended that only a very small part of the inhabitants of the village were entitled to water from said irrigation district. It was therefore contended that the distribution of water to those who might be entitled to the same from said district was not an affair of the village of Gering, and could not be.

The land platted is known as "Thornton's first addition to the village of Gering." The rest of the land is farmed, and most of the platted portions are also farmed. The whole of this land is in the village of Gering and within the Gering irrigation district. These lands receive water from the main canal of the district. It is about $1\frac{1}{2}$ miles west of the lands of the plaintiff. A part of the platted portion of the village of Gering lies between the plaintiff's land and the canal. It is claimed that this town lateral runs in an easterly direction from the main canal of the Gering irrigation district until it strikes the platted por-

Thornton v. Kingrey.

tion of the village of Gering on the west. It is claimed that this lateral is the only ditch ever used for the irrigation of plaintiff's land; that it was built by the village and by different landowners, and that since it was built it has been maintained and operated by the village. It is said that a man or a boy, referred to in the evidence as "a water monkey," has been employed by the village to attend to the distribution of water from this lateral to the various tracts of land watered therefrom, including the lands of the plaintiff; that the plaintiff has been acquainted with these lands since long before they were irrigated, and since some time in 1902; that he was not, however, the owner of the lands until 1907, at which time the lands had been irrigated from this lateral for the period of five years; that the land continued to be irrigated from this lateral until 1913, when the village board ordered the "water monkey" to refuse to permit plaintiff to draw water therefrom, and directed him to take water from another lateral. Now, it seems to be agreed that this other lateral was not built to the lands of the plaintiff, and that to reach the lands of the plaintiff would require the plaintiff, to build some 700 feet of lateral down the streets and alleys of the village. The present action was commenced in September, 1913. All other landowners, except the plaintiff and the owners of lots in Thornton's first addition, were, and are, permitted to continue the use of the lateral as before.

The plaintiff's petition alleges the ownership of the land, and the manner in which it has been watered; that the defendants Kingrey, Southwell, Birchell, Rubottom and Hayes are the members of the village board of Gering, and that the defendant Barkdoll is employed by such board to superintend the distribution of water from the town lateral, and, acting under the instructions of the other defendants, who refused to permit the plaintiff to draw water therefrom, although the Gering irrigation district turned the water into the lateral for the irrigation of this land. The plaintiff also alleged that all the other landowners

Thornton v. Kingrey.

were permitted to draw and use water from said lateral. The plaintiff prayed for an injunction to enjoin the defendants from interfering with the water turned into the lateral for the use of the plaintiff.

In the answer of the defendants it is admitted that the plaintiff owns the lands; that the lands will not grow crops without irrigation; that the lands are within the Gering irrigation district; that the defendants Kingrey, Southwell, Birchell, Rubottom and Hayes are the members of the village board, and that as such members they have assumed control over the said lateral so far as it is in the streets of the village of Gering; that the defendant Barkdoll is employed by the village board to look after the canal and to control the diversion of water therefrom to the several pieces of land situated in the village, and that the village board has instructed the said defendant Barkdoll not to permit plaintiff to receive water therefrom. And defendants further say that when water sufficient to irrigate the plaintiff's lands and the other lands in the village irrigated from said canal was carried through the lateral it flooded the streets of the village of Gering; that the defendants notified plaintiff that he must draw the water through certain other laterals constructed in the streets, and which are equally feasible; also that no permission was ever given the plaintiff to conduct water through the lateral, and that the village had no authority to give such permission.

The plaintiff in his reply alleged that the lateral was built with the knowledge and consent of the village, and since the building of the same it had been maintained by the village and taxes levied to maintain it, and that all of plaintiff's land is within such village, and that the taxes for the purpose of maintaining the lateral have been levied against said land and collected. It is further alleged that the lateral is of sufficient size to irrigate plaintiff's land and the lands of other persons who use the same. Affirmative defenses in the answer are denied.

In the bill of exceptions, there is a stipulation admitting the facts set forth in the statement made, and there is a plat showing the course of the lateral. It is further admitted that the village employed the defendant Barkdoll to take charge of the lateral and superintend the delivery of water, paying him for his services from the village treasury. Also it is stipulated that the plaintiff had demanded water from the Gering irrigation district for his lands, and that the village turned such water into the laterals in question. It is further stipulated that during the season of 1913 the plaintiff was not permitted to use water from the town lateral, and that, in order to use water from the lateral designated by the village board, it would be necessary for the plaintiff to construct the said 700 feet of lateral above mentioned, and which the village did not offer to build, but which they intended the plaintiff should build for himself.

The testimony of the witness Neeley shows that the lateral, if properly handled, has a sufficient carrying capacity to water the lands irrigated therefrom. The witness Gardner testified to a place in the lateral where its carrying capacity is limited, but that it will still carry enough to irrigate 420 acres of land. On cross-examination his evidence perhaps shows that there is sufficient capacity to supply water to everybody.

In its decree the court found the ownership of the land as alleged; the necessity or irrigation; the manner in which it had been irrigated before the time set forth in plaintiff's petition; that the village board had assumed to exercise control over the lateral, and had employed the defendant Barkdoll to divide the water among the various tracts of land. The court also found that the employment of Barkdoll was *ultra vires*, and that as a matter of law the board of trustees could not grant permission for the construction of a lateral in the streets; that prior to the commencement of this suit the plaintiff was notified that he must cease conducting water from the town lateral, and that he must draw water through another and different

lateral, and permission was given plaintiff to construct the unconstructed portion of said lateral to his land. The court also found that the village board wrongfully applied the funds of the village to the repair of said lateral; that said lateral was purely for private purposes for the irrigation of lots and lands lying within the corporate limits of the village; and that it was beyond the powers of the board to appropriate money for such purpose.

The court thereupon dismissed plaintiff's petition and found for the defendants. It is from this decree that the plaintiff appeals.

The plaintiff alleges the following errors of law: (1) The court erred in not holding that the village, by assuming control of the lateral in question, made it a part of its water-works; (2) the court erred in not holding that the plaintiff had acquired an easement by acquiescence to convey water through the lateral in question; (3) the court erred in holding that the village could discriminate against the plaintiff and refuse him the right to draw water through the lateral, and at the same time permit all others to use the lateral; (4) the court erred in refusing plaintiff the injunction as prayed and in dismissing plaintiff's action.

It is contended by the appellant: 1. That, the village having assumed control of the lateral in question, it thereby became a part of the water-works of the village. Rev. St. 1913, sec. 5119; 3 Kinney, Irrigation and Water Rights (2d. ed.) sec. 1448. The village having assumed control of the lateral it was its duty to furnish water to the plaintiff. 40 Cyc. 791.

2. The village, having acquiesced in the building of the lateral and affirmatively approved of the maintenance thereof, and having permitted plaintiff to acquire his land depending on this lateral for irrigation thereof, is estopped to deny his right to use it. *Omaha & C. B. Street R. Co. v. City of Omaha*, 90 Neb. 6; *Gregsten v. City of Chicago*, 145 Ill. 451, 36 Am. St. Rep. 496.

Thornton v. Kingrey.

3. The village is not attempting to destroy the lateral, nor abate it as a nuisance, and it is not in fact a nuisance. *City of Denver v. Mullen*, 7 Colo. 345; *City of Fresno v. Fresno Canal & Irrigation Co.*, 98 Cal. 179.

4. The village could not wrongly discriminate, and permit all others to use the lateral, and refuse the plaintiff the same right. *Pickrell v. Carlisle*, 135 Ky. 126, 24 L. R. A. n. s. 193.

The evidence shows that after the lateral was constructed the village assumed control thereof, and employed a man to maintain the lateral and to supervise the distribution of the water therefrom. It is the contention of the appellant that this lateral was a part of the water-works of the village. Section 5119, Rev. St. 1913, empowers villages "to establish, alter and change the channel of water-courses, and to wall them and to cover them over; to establish, make and regulate wells, cisterns, windmills, aqueducts and reservoirs of water, and to provide for filling the same."

The lateral in question has been taken over by the village, which assumes the control and management thereof. While this may be new in Nebraska, in the western states, where irrigation is more universal, similar conditions have arisen, and the courts of those states have passed on such questions. The result of such consideration is, we think, fairly summarized by Mr. Kinney in 3 *Irrigation and Water Rights* (2d ed.) sec. 1448, as follows: "And it is further held that where ditches and canals run through a city and the water is used therefrom by the inhabitants for irrigation, although both the water rights and the ditches and canals may be owned by others, the municipality has the power to assume the control and management of the ditches and canals and the method of distribution of the water within the city limits. And having once acquired the right to control and to regulate the distribution of the waters, and such authority having been given to be exercised for the benefit of the people, this

Thornton v. Kingrey.

duty becomes obligatory upon the municipality. And where a city with the consent of the original appropriators took control of such waters and distributed them to the inhabitants of the city, the right to exercise such control vested in the city, and it was therefore held that it was not only the right of the city, but also its duty, to employ such remedies as the law or rules of equity authorized to defend and maintain such right to control the use of such waters by the people." This would seem to give the city the right to control the property although it belongs to others. See *City of Springville v. Fullmer*, 7 Utah, 450.

"Where the water rights and the ditches and canals used in connection therewith and running within the limits of a municipality are owned by parties other than by the city or town itself, the question has often arisen as to the power of the municipality to pass ordinances regulating and controlling such rights and ditches and canals tending to restrict the original rights and privileges of the owners. A large, open irrigation canal running through the heart of a city may be dangerous at times to the life and property of the inhabitants. Oftentimes children, and sometimes older persons, fall in and are drowned. Their waters sometimes overflow or seep through their banks and the neighboring property is flooded and injured; or, again, the waters become stagnant with the accumulation of rubbish and breed disease. It is therefore necessary that there should be some control over such ditches and canals passing within the limits of municipalities so as to prevent, as far as possible, the interference with the rights and property of the municipality itself, and the danger to the lives, health, and property of its inhabitants. This regulation and control may come from two sources: First, direct statutory enactment under the police power of the state; and, second, by the way of municipal ordinances under the powers granted by the Constitution and statutes of the state. By direct statutory enactment

the legislature may require the owners of such ditches and canals operating within municipal limits to do certain things and perform certain duties for the protection of the public." 3 Kinney, Irrigation and Water Rights (2d ed.) sec. 1448. In the note to said section we find the following: "So, a statute which required the owners of such canals operating within the limits of municipal corporations to construct certain devices, such as lattice work and slats at the head of flumes to prevent persons and animals from being drawn through the flumes, was held to be valid as a proper exercise of the police power of the state; and, further, that the failure to perform such statutory duty specifically imposed was negligence *per se*, and, in the absence of contributory negligence, a recovery may be had for an injury thereby occasioned"—citing *Platte & Denver Canal & Milling Co. v. Dowell*, 17 Colo. 376.

In *Mugler v. Kansas*, 123 U. S. 623, 661, it is said: "The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."

This doctrine, applicable to a legislative act, is by *Platte & Denver Canal & Milling Co. v. Lee*, 2 Colo. App. 184, held applicable to an ordinance seeking the punishment of those persons who had acquired certain rights touching the construction of ditches, and refused to be bound by an ordinance curtailing the enjoyment of the same.

Thornton v. Kingrey.

An injunction will lie restraining a city from interfering with the use of ditch property which has not been lawfully ascertained and declared to be a nuisance. *City of Denver v. Mullen*, 7 Colo. 345.

The right of a municipality to the exclusive control and regulation of water within its limits, to which others have a paramount right and ownership, prior to the incorporation of the municipality, is based upon the acquiescence of such owners. *Fisher v. Bountiful City*, 21 Utah, 29.

In *Levy v. Salt Lake City*, 5 Utah, 302, the city did not build the ditch, which received water from a creek and carried it to several lot owners for purposes of irrigation. The ditch was built by private landowners for their benefit, but it ran through block 59 of Salt Lake City. The city assumed control of this water, and turned it onto the premises of a lot owner to such an extent that it overflowed the land and ran into a cellar, where it injured personal property which was stored there. In an action by the owner of the property against the city it was held to be liable for the damages sustained, although the rights of the original builders of the ditch and users of the water were recognized and protected. The city was held liable for its mismanagement of its water system, of which the ditch was treated as a part. This is not unlike the instant case so far as the protection of the rights of the ditch builder is concerned. While the water comes from a private source and runs into a ditch constructed by private parties, it is yet subject to the control of the village, provided that the water users should not be deprived of the use of the water. The plaintiff is therefore entitled to a remedy which gives him the water which is turned out to him from the canal of the irrigation district.

In the brief of appellees we are cited to that part of section 5132, Rev. St. 1913, which reads: "To open, widen or otherwise improve or vacate any street, avenue, alley or lane within the limits of the city or village."

We are next cited to so much of section 5141, Rev. St. 1913, as provides that the "board of trustees shall have the care, supervision and control of all public highways, bridges, streets, alleys, public squares and commons within the city or village, and shall cause the same to be kept open and in repair, and free from nuisances."

To do what appellees suggest in their brief—fill up the ditch and remove the obstruction—would be an interference with the plaintiff's use of his property, the water that comes to him out of the canal of the irrigation district, and which he should be permitted to use unless the destruction of its use becomes necessary in the interest of the public welfare. Besides, it does not appear that the village board of the village of Gering desires to destroy the ditch, or that there has been any attempt by the board to pass a resolution of that kind. There is only an attack on the plaintiff's use of the water. Water for irrigation is very much a necessity in the neighborhood of Gering and in many thousands of square miles all about Gering. The people there are used to ditches, and uncovered water running in them is so common that it does no violence to the feelings of any resident. An irrigated field with its very necessary ditch becomes a thing of beauty which delights the eye and cheers the spirit.

Where an irrigation and land company succeeded its predecessors in interest and acquired an easement and right of way for the construction of certain ditches to carry water for irrigation purposes, and the ditches were constructed and were used to carry the water according to the plan under which they were made, it was beyond the power of the city to destroy the property rights of the company, although it might destroy the ditches and compel the company to change the plan of its conduit from an open ditch to a pipe-line; but there could be no destruction of the easement or right of way acquired by the company. *City of Nampa v. Nampa & Meridian Irrigation District*, 19 Idaho, 779. In the syllabus in this case it is said: "A grant to a canal company of a

Thornton v. Kingrey.

right of way or easement for its ditches in the streets of a city is subject to the right of the city to thereafter regulate the manner of the exercise of such easement, or to change the grade of the streets in such a way as to require a corresponding change in the conduit for the delivery of water; and in exercising its right to grade its streets, the city may, if it becomes necessary so to do, remove such ditches and require the reconstruction of the company's system by a pipe-line beneath the surface." In the same case it is said, in substance, that lot owners in a city who have become entitled to the use of water from an irrigation system cannot be compelled to pay for the company's system, nor can they be denied water for the reason that its delivery has been made more expensive.

The plaintiff in this case is entitled to the use of the water which he gets from the canal because it is given to him by the irrigation district. The lateral which furnishes water to plaintiff runs through the main street of Gering, and its grade is so steep that in times past the water eroded the side of the ditch and made it ten feet wide in places. To remedy this the town board put in eight or nine drops from four to five feet high so as to lessen the force of the water and prevent the cutting of the banks. It was finally determined by the authorities that if no more water than necessary to irrigate the platted portion of the town site was carried through the ditch the street could be preserved, but if it was attempted to carry water enough to water the farm lands below, in addition to the water for the inhabitants of the village, the ditch would overflow, injuring the streets, and would seep into the cellars and foundations of the business buildings. For these reasons, the council passed the ordinance complained of, providing that no water for land should be carried through this lateral, but that the same might be carried in a lateral near-by. The village has the right to regulate the use of its streets. It seems that the plaintiff, relying upon the fact that

Wunrath v. Peoples Furniture & Carpet Co.

the village had permitted him to obtain water from the main ditch by means of the lateral in question, expended money and labor upon his place in order to receive the water at the point where it was delivered to his land. The evidence shows that to take the water to his land from the other lateral will require the construction of about 700 feet of new lateral. It would be inequitable to permit the village to deprive the plaintiff of the use of the water from this lateral unless provision is made to supply the water to him by other means.

The judgment of the district court is modified so as to require the village, before ceasing to supply the plaintiff with water through the lateral in dispute, to take such steps as may be necessary so that plaintiff may be able to receive upon his land as much water through another lateral as he formerly obtained from the lateral in dispute, and without additional expense for construction of the same.

JUDGMENT MODIFIED.

WILLIAM WUNRATH, APPELLEE, v. PEOPLES FURNITURE &
CARPET COMPANY, APPELLANT.

FILED DECEMBER 19, 1916. No. 19667.

1. **Master and Servant: INJURY TO SERVANT: SUFFICIENCY OF EVIDENCE.** Evidence examined, and *held* sufficient to support the verdict of the jury.
2. ———: ———: **INSTRUCTIONS.** The instructions set out in the opinion, when construed together, *held* free from error.
3. **Trial: INSTRUCTION TO DISREGARD EVIDENCE.** A trial court is not warranted in giving an instruction to a jury that, if they believe any witness has intentionally sworn falsely to any material matter in the case, they are at liberty to disregard the entire testimony of such witness, unless the evidence tends to show that a witness was wilfully guilty of false swearing on a matter material to the issues.

Wunrath v. Peoples Furniture & Carpet Co.

APPEAL from the district court for Douglas county:
JAMES T. BEGLEY, JUDGE. *Affirmed.*

Mahoney & Kennedy and *Nolan & Woodland*, for appellant.

Brome & Brome and *A. H. Burnett*, contra.

MORRISSEY, C. J.

Defendant appeals from a judgment entered in the district court for Douglas county awarding plaintiff \$8,500 damages for injuries sustained while in defendant's employ. Defendant first contends that the verdict is contrary to the evidence. Defendant was engaged in the furniture business, occupying an entire building. This building was equipped with an elevator running from the basement to the top of the building. The main sales-room was located on the ground floor. The sales-room occupied the entire ground floor, except that at one end there was a balcony, and in the northwest corner a partition inclosing the elevator shaft, together with a corridor leading past the shaft to a toilet room. The corridor was about five feet in width, and it was entered from the main room by a door which was the full width of the corridor. When this door was opened it swung into the corridor. The elevator is located opposite the entrance, so that one entering the corridor from the main floor would stand immediately in front of the elevator door, or the elevator shaft, if the door was open. The door of the elevator shaft was the full width of the corridor and reached from the floor to the ceiling. This was a double door with hinges attached on one side of the opening, and also hinges in the middle so that one half of the door might be opened while the other half remained closed.

Plaintiff visited this building for the first time May 24, 1910, and made an arrangement with the assistant manager to take employment as a porter or janitor. The assistant manager gave him a set of written instruc-

Wunrath v. Peoples Furniture & Carpet Co.

tions, and also told him that his brooms, brushes and implements with which he would be required to work were kept in the toilet room mentioned, and went with plaintiff through this corridor into the toilet room and showed him where they were to be found. Plaintiff reported for duty the next morning when the store opened. In obedience to the instructions he received the day before, he started for this toilet room, intending to leave his dinner pail and to secure a broom with which to begin work. He passed through the door leading into the corridor, which he says was closed, and immediately fell into the elevator shaft, a distance of 12 or 15 feet, receiving injuries to his head, shoulder, back and knee.

It is alleged that, when plaintiff opened the door leading from the main store into the corridor, the corridor was unlighted; that the door opening from the corridor into the elevator shaft was open, and the opening to the elevator shaft unguarded; that plaintiff did not know there was a door leading from the corridor into the elevator shaft, and, because the corridor was unlighted, plaintiff was unable to discover the danger, and that the injuries received were due to the failure on the part of defendant to advise him of the location of the elevator shaft, and in leaving the door thereto open and unguarded.

Defendant denies each of these charges of negligence, and insists that plaintiff has not only failed to prove these allegations by a preponderance of the evidence, but that they are disproved by a preponderance. There are, however, certain undisputed facts which may be considered in connection with the disputed testimony. It is admitted that Wunrath applied to defendant the day before the accident and secured employment; that its assistant manager told him that the brooms and brushes were to be kept in this toilet room at the end of the corridor; that on the morning of the accident plaintiff arrived at the store for the purpose of going to work, and that he went into this corridor for the pur-

pose of leaving his hat, coat and dinner bucket and procuring his brushes according to the instructions given by the assistant manager the day before; that, upon his failure to return, the assistant manager went to look for him and found him, together with his hat, coat and dinner bucket, lying at the bottom of the elevator shaft. He was then unconscious and remained in that condition for several hours.

Wunrath testified that he stepped through the door leading into the corridor, turned around to close the door behind him, and was immediately precipitated to the bottom of the elevator shaft. He does not say that the door to the elevator shaft was open; but, if it were closed, he could not have fallen into the elevator shaft without first opening the door. He testified that the hall was unlighted. Defendant has offered testimony going to show that the door to the elevator shaft was equipped with coil springs which automatically closed the door and kept it closed, except when it was held open. The assistant manager testified that, when he went in search of plaintiff, he found the door closed. There is also testimony of other employees that the door was equipped with springs which automatically closed it. The door extended from the floor to the ceiling, and the knob by which it was manipulated in opening and closing was fastened to the door six feet or more above the floor. If the door was closed when plaintiff stepped into the corridor, before he could fall down the shaft he would have to reach up, grip this knob, open the door, and then step into the shaft. There is no reason why he should have done this, and it does not stand to reason that he would do so. On the other hand, if the hall was unlighted and the door open, his story is entirely probable. The plaintiff and the assistant manager both testified that he was shown into the toilet room the day before, so he knew its location. When he stepped into the corridor, there can be no question but that he intended to deposit his dinner bucket and his coat and hat in the toilet room,

Wunrath v. Peoples Furniture & Carpet Co.

but he never reached that room. These articles were found with him at the bottom of the shaft. The night watchman testified that the elevator doors were closed when he visited the toilet room sometime during the night. However, there was nothing to expressly direct his attention to that fact. There is more or less discrepancy in the testimony of witnesses of the defendant as to the construction of the door and the springs by which they were supposed to be closed.

A witness named Smith, who was in the employ of defendant at the time the accident occurred, testified that half of the door could be opened and placed in such a way that it might remain open. H. B. Wunrath, a son of plaintiff, visited the store soon after the accident, with Dr. Whinnery, and gave the following testimony: "Q. What I want to know is, would the east half of the door stay open if it was pulled open? A. Yes, sir; it was open when he stood there. Q. And stood there? A. Yes, sir. Q. Without anybody holding it? A. Yes, sir." The evidence of Dr. Whinnery was that he, in company with young Wunrath, inspected the doors soon after the accident; that he opened one-half of the door, and that it remained open, and he explained his recollection: "Q. Did you have the whole door open, or did it stay open on its own volition? A. No, sir; it stayed itself. How I remember that I opened the door so well was, I commenced to feel for the knob. That place was not well lighted, and I commenced to feel for the knob. And he said 'higher,' and I went up and finally got the knob. Q. How high up was the knob? A. Quite a way to reach. The door could open perfectly easy, and I stood there and tipped that door open. There wasn't anybody guarding the door. Q. Nobody held the door open? A. No, sir." Dr. Whinnery subsequently visited the store with another son of the plaintiff. He testified that on this occasion the assistant manager opened the door, and that the door stood open without being held or fastened in any way. On the whole, the testimony supporting plaintiff's theory

Wunrath v. Peoples Furniture & Carpet Co.

that the door was open seems sufficient to warrant the trial court in submitting that question to the jury, and is sufficient to support the jury's finding thereon.

Defendant also complains of the instructions given by the court, and points out that in stating the issues, in instruction No. 1, the court told the jury: "Plaintiff charges defendant with negligence in three particulars: First, that defendant failed to inform him of the existence of said elevator shaft; second, failed to cause said corridor to be lighted; and, third, that defendant negligently caused and permitted said elevator door to be left open and the shaft unguarded."

Instruction No. 2 is as follows: "The burden of proof in this case is upon the plaintiff to establish by a preponderance of the evidence: First, that the defendant was guilty of negligence in one or more of the particulars charged in the petition; second, that plaintiff's injuries, if any, were the direct result of negligence of the defendant charged and proved; and third, the character and extent of his injuries, and the amount of his damages, if any, resulting therefrom. If all of the above matters are so established to the satisfaction of the jury, then your verdict should be for the plaintiff, unless you find, from a preponderance of the evidence, that the plaintiff was guilty of negligence contributing to cause his injuries. The burden is also upon the plaintiff to establish, by a preponderance of the evidence, that the elevator door in question was open at the time plaintiff entered the corridor."

Defendant criticizes this instruction, insisting that it told the jury that, if any one of the acts of negligence designated in instruction No. 1 were found to exist, they might return a verdict for plaintiff. This instruction must be construed in connection with the other instructions given, and if, when they are all taken together, the jury is fairly instructed the instructions will be upheld.

Instruction No. 4 told the jury: "If you find from a preponderance of the evidence that, at the time plaintiff entered the corridor in question, the door leading into the elevator shaft was open and unguarded, and that defendant had not used proper care to prevent such condition, and that plaintiff did not know that said door was open, and did not, in the exercise of ordinary care, discover that fact in time to avoid the accident, then your verdict should be for the plaintiff. On the other hand, if you find from the evidence that, at the time plaintiff entered the corridor, the door leading into the elevator shaft was closed, or, if you find that said door was open, and you further find, from a preponderance of the evidence, that the plaintiff, in the exercise of ordinary care, should have discovered that fact in time to have avoided his injuries, then your verdict should be for the defendant; or, if you find from the evidence that the plaintiff himself opened the door leading into the elevator shaft, your verdict should be for the defendant."

The second paragraph of the third instruction, which reads: "If you find, from a preponderance of the evidence, that leaving the door into the elevator shaft open and unguarded rendered passage through such corridor by a person using ordinary care unsafe, then it was the duty of the defendant to exercise ordinary care to keep such door shut, and a failure to do so would be negligence"—is criticized because, it is said, this paragraph assumes that the door to the elevator shaft was open, and takes from the jury this important question of fact. If this paragraph of the instruction could be segregated from the other instructions, it might be given the interpretation which defendant would have us give it. But instruction No. 4 expressly told the jury that, if they found from the evidence that the elevator shaft was closed when plaintiff entered the corridor, or that he opened the door himself, the verdict should be for defendant. The criticism directed against instruction No. 5 is along the same line.

Instructions are to be construed together, and when these paragraphs are read in connection with the other paragraphs, it is clear that every disputed question of fact was properly submitted to the jury.

The next assignment deals with the court's refusal to instruct the jury that, if they believed any witness had intentionally sworn falsely to any material matter in the case, they would be justified in disregarding the entire testimony of such witness. The general rule is that the trial court is not warranted in giving such an instruction, unless the evidence tends to show that a witness was wilfully guilty of false swearing on a matter material to the issues. It therefore devolved upon the trial court to determine whether, under the facts and circumstances, there was evidence tending to show that any witness whose evidence was submitted to the jury did wilfully swear falsely. In determining this question, it was the duty of the court to bear in mind that wilfully false swearing is not lightly to be imputed to a witness. Discrepancies, conflicts and contradictions in evidence are more often honest mistakes due to faulty observation, imperfect recollection, or varying impressions which the facts may have made on the mind. Before a court is warranted in giving this instruction it must find something in the appearance, demeanor or manner of a witness while testifying, or such conflict and contradiction between him and the other witnesses in the case, or such an inherent incredibility in the story told, as would reasonably tend to show that he wilfully swore falsely. We find nothing in this record which would warrant us in saying the court was guilty of an abuse of discretion in denying this instruction.

Misconduct of the jury is also alleged, and we find a showing and counter showing in the bill of exceptions. There appears to have been an acrimonious debate between two of the jurors, but after this debate had subsided the jury deliberated for several hours before they reached a verdict, and finally came into court the fol-

lowing morning, and this juror, who now seeks to impeach the verdict, together with his fellow jurors, returned the verdict into court in the usual way. There is no misconduct shown which would warrant us in disturbing the verdict.

This leads us to the consideration of the sole remaining question: Is the verdict excessive? At the time the accident occurred, plaintiff was 56 years of age, with a life expectancy of more than 16 years. He was earning \$12 a week, without any prospect of promotion or increase of income. It is claimed in his behalf that the injuries received have totally incapacitated him for labor, and that he has undergone great pain. The case has twice been tried. The first jury returned a verdict for \$8,100, and the second a verdict for \$13,500, on which the trial court ordered a remittitur of \$5,000, which was entered, although appellee now asks us to disregard the remittitur and enter a judgment for the original amount of the verdict under the provisions of chapter 247, Laws 1915. Defendant denies that plaintiff is wholly incapacitated for labor. It appears that in September, 1913, three years after the accident, he undertook to do janitor work in an apartment house. He lived with his family in this building from September until March. Plaintiff and members of his family testify that he was unable to do the work alone, but that his sons, daughter and wife assisted him and really did the greater part of the work; while defendant offers the testimony of the proprietor of the building and another witness, who visited the building from time to time, who say they saw the defendant shoveling coal and doing other work of like character. With the exception of this short period, he had done nothing during the five years intervening between the date of the injury and the date of the trial. Defendant might have availed itself of its right to have him submit to a medical examination (*State v. Troup*, 98 Neb. 333), but did not see fit to do so. Plaintiff was before the jury and the trial judge, and they were better able to

Nutter v. Standard Land Co.

judge of his physical condition than we may do from the printed record. We may assume that he is permanently and totally disabled. He has also endured great pain and suffering. For this it is hard to fix a proper amount of recovery. In view of the two verdicts returned, and the order made by the trial judge, we are not prepared to say that the recovery is excessive. On the other hand, we must refuse to entertain appellee's request to enter a judgment for the original amount of the verdict, and the judgment will be affirmed for the amount fixed by the trial court.

AFFIRMED.

ROSE, J., not sitting.

WILLIAM H. NUTTER, APPELLEE, v. STANDARD LAND COMPANY ET AL., APPELLANTS.

FILED DECEMBER 19, 1916. No. 19063.

Appeal: REMITTITUR. Where, in a case appealed to this court, the record clearly shows that the judgment is excessive in a certain amount, a remittitur will be ordered, and if the remittitur is not filed the judgment will be reversed.

APPEAL from the district court for Buffalo county:
BRUNO O. HOSTETLER, JUDGE. *Affirmed on condition.*

Fred A. Nye, John A. Miller and Strode & Beghtol,
for appellants.

W. L. Hand and N. P. McDonald, contra.

BARNES, J.

This was an action to recover damages which plaintiff alleged he had sustained by reason of deceit and fraud practiced upon him by the defendants the Standard Land Company and Samuel C. Hawthorne, in exchange of plaintiff's land situated in Buffalo county, Nebraska,

Nutter v. Standard Land Co.

for certain land of the Standard Land Company situated in Hidalgo county, in the state of Texas. A trial in the district court for Buffalo county resulted in a verdict in favor of plaintiff for \$16,806.79. Defendants' separate motions for new trial were overruled. Judgment was rendered on the verdict, and both defendants have appealed.

The record contains a copy of plaintiff's petition, in which it is alleged, in substance, that defendants, the Standard Land Company and Samuel C. Hawthorne, in order to induce the plaintiff to make the contract for the exchange of the real estate described therein, represented to plaintiff that a part of the land which he took in exchange contained 210 acres of what is called the lower lift land, situated near the Rio Grande river in Hidalgo county, and described as certain lots in block 14, all good, tillable and irrigable land, and having no resaca or lake thereon; that it was worth \$150 an acre, and was not subject to overflow; that plaintiff relied on defendants' representations and believed the same, and had no opportunity to ascertain the facts in relation to the amount of land in the tract above mentioned; that a resaca was situated thereon, and that he had no means of knowing the value and quality thereof; that defendants' representations and statements were false and untrue in this, that in fact and in truth there was situated thereon a resaca which covered about 60 acres; that the land was subject to overflow, which rendered it valueless; that the remainder of the tract was in truth and in fact not worth over \$25 an acre; and that the tract of land contained only 201.72 acres, instead of 210.72 acres as represented. Plaintiff prayed for a judgment for \$26,565 and costs.

The defendants filed separate demurrers to the petition, which were overruled, and the defendants each excepted. They then filed separate answers. Hawthorne, by his answer, denied that he was either an officer or stockholder of the Standard Land Company when the trade was consummated, and alleged that he made no repre-

sentations whatever to the plaintiff; that he received no benefits out of the exchange of plaintiff's land for that of the Standard Land Company, and denied each and every allegation contained in plaintiff's petition. He prayed for a dismissal of the action.

The defendant Standard Land Company, by its answer, alleged that it is not now, and never has been, a resident or citizen of the county of Buffalo, in the state of Nebraska; that it did not at any time enter into any of the dealings or transactions with Samuel C. Hawthorne or Ralph R. Langley, as its president, as alleged in plaintiff's petition; that it had not at any time incurred a joint liability with its codefendants Samuel C. Hawthorne and Ralph R. Langley in any of the matters set up in plaintiff's petition; that no summons or process of any nature had been served upon the defendant Standard Land Company in Buffalo county, Nebraska, and that it had never voluntarily appeared in said action; that plaintiff wrongfully and collusively joined this defendant with its codefendants Samuel C. Hawthorne and Ralph R. Langley, for the purpose of forcing this defendant to defend said action in a county other than that of its residence; that, by reason of the matters and facts above stated, the court has no jurisdiction over the Standard Land Company in this action. For further answer to the petition, the defendant Standard Land Company alleged that its codefendants Samuel C. Hawthorne was not at any of the times complained of in plaintiff's petition an agent of this answering defendant, nor its representative in any matter, nor was said Samuel C. Hawthorne connected in any way with this answering defendant; that this answering defendant had no part in any transactions by Samuel C. Hawthorne with the plaintiff; and for further answer to the petition the defendant denied each and every allegation therein, and concluded its answer with a prayer that it go hence without day and recover its costs.

Nutter v. Standard Land Co.

Separate motions were filed before the commencement of the trial requiring the plaintiff to elect whether he would try the case for false representations concerning the land which he had purchased, or whether he would rely for his case upon the allegations that he was shown other land than that which he actually received and contracted for, or whether he would prosecute this action for failure to obtain title to the land actually bought. The court overruled the motions, and defendants excepted.

The case coming on for trial, each of the defendants objected to the introduction of any evidence for the reason that the petition failed to state facts sufficient to constitute a cause of action, which objections were overruled. The defendants separately excepted to each of the instructions given and refused by the trial court.

Among other things, appellants contend that the evidence is insufficient to support the judgment, and that the verdict was excessive. These assignments of error will be first considered.

The testimony of plaintiff as found in the record is, in substance, as follows: He was a farmer 55 years of age, and prior to entering into the contract with the Standard Land Company was the owner of 480 acres of land near Gibbon, in Buffalo county, Nebraska, and 800 acres situated on an island in the Platte river in that county; his lands were heavily incumbered, and in April, 1911, Mr. Butcher, agent for the Standard Land Company, induced him to make a trip to the lower Rio Grande valley in Texas. They met defendant Hawthorne at Lincoln, and went with an excursion party of the Standard Land Company. On arriving in Texas, they met Mr. Langley, the president of the company. They remained in Texas, in and near San Juan, for about two days. He was taken around the country in an automobile. He entered into a contract with the company to purchase about 80 acres of land. He made another trip to San Juan, Texas, in the fall of 1911, and stayed there for six weeks, at that time putting up cane for the

Nutter v. Standard Land Co.

defendant company. When he was in Texas on his first trip, he went over the lower lift with an excursion party. The lower lift is about a mile south of San Juan. When he was down there in the fall of 1911, he became acquainted with the country all around San Juan. He returned in December, and saw Mr. Hawthorne about the 10th of that month. They talked about Texas lands. The next time he saw Mr. Hawthorne was in Omaha on May 20, 1912, at the Standard Land Company's office. Plaintiff said: "I told him, * * * I wanted to either call this deal off or go through with it." Hawthorne told plaintiff that he had sold off part of the Texas land which was in his contract; that they could make up the difference by including land on the lower lift. Plaintiff said he told Hawthorne that he either wanted to call the deal off or go through with it; that Hawthorne told him that he thought he had sold off part of the land that was in his contract, but that they could make up the difference by including land on the lower lift, which was priced at \$150 an acre; he said this land did not need fertilizing, that it would raise anything the upper lift would; he said the land did not generally overflow, but that it had overflowed 17 and 30 years ago; that he intended to take a piece of this land, as it was the very best. Plaintiff said Mrs. Nutter was with them; that he relied on Hawthorne's statements and believed everything he said up to that time; that Hawthorne went out; that Langley called them into his room, and that he told Langley that he was there to close the deal or call it off. Langley stated, in substance, the same as Hawthorne had told him. Langley told him there were 210.72 acres they could substitute on the lower lift, and that it never overflowed; that he relied on Langley's statements and entered into the contract; that after they signed the contract which was read to him they went out to dinner, and he did not see Hawthorne again that day. Nutter further testified that they wanted him to sign the vendor's lien notes, but he would not sign them until he had

Nutter v. Standard Land Co.

seen the land; that they were afterwards sent down to Texas for his signature and he signed them; that he got his deed for the upper lift lands, but never got a deed for the land on the lower lift. Langley said that Mr. Kean would show him the lower lift land. Nutter testified further that they all went down to Texas on the following 4th of June; that they saw Mr. Kean there; that they had an automobile and went out to look at the land. Mrs. Nutter went along. They went across the basin and it was dry. Kean showed him the north-west corner of the land. Nutter testified that he got out several times and looked the tract over; that he had no information as to the corners, except what Kean and Langley had told him. They stayed down there until August, when they returned to Nebraska. They went back to Texas in October, when they decided to go down and see the land on the lower lift again, which they did. They found water there. Hawthorne and Langley were there then, and Hawthorne took off his shoes and waded across the water, which covered some 20 or 30 rods in width. They went down later, on Thanksgiving day, and the water was then about 10 or 12 rods wide. He testified that his land near Gibbon was priced in the exchange at \$125 an acre, and his land on the island was put in at \$50, making a total valuation of \$55,656.

The contract made May 20, 1912, was introduced in evidence, and provided, in substance, as follows: The Standard Land Company had sold to the plaintiff 445.61 acres of land in Hidalgo county, Texas; the payment for said land and the price named in the contract was \$150 an acre, the amount being \$66,841.50. Plaintiff agreed to convey by warranty deed to Dan W. Gaines his lands in Buffalo county, 320 acres of it at the price of \$41,200; 800 acres, known as the Island farm, was taken at \$32,000. It was agreed that the land company should allow plaintiff the sum of \$3,200, being a loss sustained on the former sale of real estate. The land

Nutter v. Standard Land Co.

company was to have \$2,335, making a total of \$74,065. It was agreed that the lands deeded by the plaintiff and his wife to Cines were subject to liens or incumbrances to the amount of \$22,000 and no more. The Standard Land Company agreed to pay plaintiff the sum of \$5,000 with which to pay off certain indebtedness on his home in Gibbon, Nebraska, with the further sum of \$5,000, as plaintiff desired, for the improvement of the lands purchased by him in Hidalgo county, Texas. The remainder of the consideration due the land company was \$24,776.50, and was to be evidenced by the first vendor's lien notes on the Texas lands described in the contract. The notes were to be executed at the time of the delivery of the deed, and were to run in installments of one, two and three years from March 1, 1912, with interest at 6 per cent. per annum, payable annually. It was further agreed that, in event the liens against the land so deeded by plaintiff and wife to Dan W. Gaines should exceed the sum of \$22,000, then, in that event, the excess above such amount should be added to the vendor's lien notes. Deeds were to be executed to Dan W. Gaines to be left in escrow with the Standard Land Company and to be delivered when abstract of title was brought down to date. The purchase and sale was to be in full settlement of all prior contracts executed between the parties respecting the purchase and sale of Texas lands and the land of plaintiff, and, in event the incumbrances of the property of the plaintiff should be less than the \$22,000, then the difference should be deducted from the vendor's lien notes to be secured on the Texas land. Plaintiff, continuing his testimony, stated, in substance, that he was curious to know how the water got on the land in Texas, whether by reason of rains or from overflow from the river; that there was about four or five inches of rain in that county the last of June, 1912, and he could not tell how the water got on the land. The record shows that Nutter did not pay the first of the vendor's lien notes when it became due, and Langley

demanded payment and tendered a deed to Nutter for the lower lift lands.

On cross-examination plaintiff testified that he made his first trip to Texas on April 8, 1911; that he found the corn down there was just earing out and of good quality. Pictures were taken, which are attached to the record. He went to Texas the second time in July of the same year with his brother-in-law; they stayed two or three days. When he came home he got ready to go down there and put up cane for the defendant company. He made another trip in the fall of 1911 to put up cane for the company. His three boys went with him. The cane was located north of San Juan and was growing on land somewhat like the land he had purchased. The cane was of good quality. There is a picture in the record taken of the cane field where they were cutting. He stayed six weeks, and got acquainted with the people down there at that time. While down there on that trip, he had occasion to go south of San Juan about a half mile to cut a piece of cane. He came back and executed a memorandum contract on December 21, 1911. The contract was satisfactory to him then, and carried out his wishes the way it looked to him. He made another trip in March, 1912, to Texas, at the request of Mr. Langley. They showed him some pieces of alfalfa north of San Juan, some west of San Juan and south of McAllen. They were pretty fair. The purpose of the trip was to see whether alfalfa would grow. He was satisfied with it at that time. He went down again on June 4 of the same year. He made up his mind to make the contract before he went to Omaha. He concluded to go through with it or call the deal off. The last trip was made to Texas in March, before he bought the land. He went down there on June 10 to look at the land. He had not signed the vendor's lien notes then. He had been around there four or five times before this trip, and had been at liberty to go and come as he pleased. He knew what resacas were before May 20. He knew

what the first and second lift land was. He had more talk with Langley than with any one else. He asked Langley the day the contract was made whether the land was in or near lake Sardines. He wanted to look at it. He was not satisfied with what they told him and wanted to see it before he consummated the deal. The land that Mr. Kean showed him was all right. He did not know then that it overflowed. Mr. Butcher first interested him in Texas land. He read the government reports about soil and conditions down there before he went down and before he made the final contract. He left Texas and came back to Nebraska about December 18, 1912. He came back because his wife did not like the country. He would have stayed there and run his chances with the rest. He liked it when he first went down there and thought it a great country. His wife is the one who caused him to go down there. He saw water on the land several times during the summer. There was no water on the land when he went there with Mr. Kean on June 10. On June 22 he saw water there. There was a big rain after he got there, between June 10 and June 22. Mr. Kean pointed out the northwest corner as they came out of the basin. The resaca was on the north side. It appears from the testimony that a resaca, as described by a witness, is a depression like a ravine through which the water ran in times of rain. Mrs. Nutter, in a measure, corroborated the testimony of her husband. Nutter said he wanted to trade his Nebraska lands for the Texas lands. He thought he liked the country. He made one trip before April, 1912, and another again in June, 1912. He stayed in Texas from that time until August, and then returned to Nebraska and stayed until October 15, then started back to Texas and lived on the farm until December 18. He signed up the vendor's lien notes in July.

Mr. Frank, a witness for the plaintiff, testified that he was able to cross the resaca in March, 1914. There was no water there at that time. The resaca appears to

Nutter v. Standard Land Co.

be a drainage course. He did not consider it productive. The resaca was only waste land. He had heard it said that the first lift was the most productive land in the valley for sugar cane. The land is level and in its wild state is covered with brush. This kind of growth is found on both the first and second bottom. It can be cleared readily. The soil is a dark sandy loam about 20 feet deep.

One Lucas testified as a witness for plaintiff that he was down in San Juan in 1912. He had been down "road 1" many times. There were two low places. There was water in both of them. They had a heavy six-inch rain down there in June, 1912. The resaca was dry the first time he went down there.

The plaintiff was recalled, and testified that he did not know at the present time what the market value of the land was on May 20, 1912; that he did not know what the actual value of the land was at that time. This is the substance of the plaintiff's testimony.

Witness Frank testified, in substance, that the depth of the soil on the second lift is 20 feet. He owns land there which he purchased in 1912, and raised corn, alfalfa and vegetables of the first class. The corn was raised on the edge of the first lift, and, in the opinion of the witness, would yield 80 bushels an acre, although he had heard it said it would go 100 bushels to the acre. The quality of the crop raised is of the best. Last year he raised 600 bushels of Bermuda onions on two acres. The water is good for domestic purposes. The country seems to be perfectly healthy. On cross-examination he testified that one field west of Parker raised 40 tons of cane an acre last year, which sold for \$3.25 a ton. A man can raise 300 hampers of lettuce on an acre, and the market price for vegetables is good; the highest was \$35 a ton for cabbage last winter, and the lowest \$10 a ton.

Ralph R. Langley testified that he was the president of the Standard Land Company in 1912 and since that date; that Mr. Hawthorne had no interest in the com-

Nutter v. Standard Land Co.

pany after he sold out, except that he agreed to go down on the next excursion. He bought his interest for himself and Mr. Gaines. He first met Mr. Nutter at San Juan in 1911. Mr. Nutter wanted to buy a good piece of land, but did not have the money. He wanted to sell some of his land in Nebraska, and would use the proceeds to buy Texas land. Witness wrote a contract with Nutter whereby the company had the privilege of selling 800 acres of his land. Witness knew nothing about the land. In event the company sold the land, he was to use the proceeds to buy Texas land. Nutter wanted to put in all of his lands in Nebraska and go down to Texas. Witness found that Nutter had listed the Nebraska lands at such high prices that they could not be sold. Nutter represented that the incumbrances were much smaller than they were; represented them as being only about half what they proved to be. They were past due, or about due. They found it would be necessary to pay about \$40,000 in order to save the equity in Nutter's land, all of which was contrary to Mr. Nutter's representations. Nutter went to Texas in 1912 to put up sorghum for the company. He came to the office one day and said he wanted to rearrange his deal so he could have land on the first lift, for the reason that he thought it would grow better alfalfa than the second lift. He went down to Texas on that excursion and looked at 160 acres of alfalfa on the first bottom south of Mission. Langley stated that he did not encourage Nutter to buy any land; in fact, he tried to discourage him. He further stated that Nutter came to the office on May 20 and wanted to consummate his transaction right then, so he got Mr. Gaines to figure out some way that they could possibly make the deal. Langley made arrangements with Mr. Dan Gaines to put up the money that was necessary to pay Nutter's incumbrances and personal debts. Mr. Nutter desired to have first bottom land. Langley showed him a blue print which shows the contour and elevation

Nutter v. Standard Land Co.

of the first bottom land, the only land he could sell him, which was 201.72 acres. Nutter said he would see it, and they entered into a contract with him. At that time it was impossible to determine the exact amount of his indebtedness, and hence the amount of his vendor's lien notes could not be determined. Nutter went to Texas, and Mr. Gaines paid his indebtedness, which was more than was expected. They found out the amount his notes would be, and sent them down to him to sign, and in the meantime he had examined the land which he had purchased. When the contract was made, Langley told him that he would execute his deed and retain it until he paid his first notes. There was an error in the amount of the land. It was called 210.72 acres, when in fact it was only 201.72 acres. When March 1, 1913, came, he did not pay his note. Langley paid all the incumbrances against his land, and tendered his deed to him and demanded payment for the note. Nutter put in a crop in a very poor manner and did not take care of it. They gave him \$5,000, as required by the contract. He spent only a small portion of it on the land. In fact, he was paid more than that amount. They have always been willing and ready to deliver the deed to him, and had it ready to deliver and tendered it to him. Langley never made any representations whatever as to the character or quality or value of the land. Mr. Nutter had seen the valley before that time. The company had to raise more than \$27,000 to pay the incumbrance on a portion of his land, and about \$13,000 on another tract, and an additional incumbrance of \$5,000 on 800 acres of it. Mr. Hawthorne had nothing whatever to do with making the contract. Mr. Nutter said that he wanted to divide his land, half of it on the second bottom and half of it on the first bottom. He was familiar with the first bottom and the second bottom land, and knew the difference. He said he considered the first better than the second bottom land. Langley made no representations to him about it. Parts of the

Nutter v. Standard Land Co.

first bottom land will overflow at times. Langley only knew of its overflowing one time before Mr. Nutter made this contract, and had told him about it before. Langley attempted not to take his land because he did not want that "white elephant in Nebraska" on his hands. It was incumbered for more than its normal value, and the incumbrances were past due and subject to foreclosure. It took a large amount of money to pay them, and they did not have it. The fair market price of Texas land was from \$150 to \$165 an acre. They could sell it very easily, and did sell all of the adjoining lands, at these prices, and later on it sold for more money. They sold 10,000 acres in that vicinity at those prices during 1911, 1912, and 1913, not an acre for less than \$150, and later on as high as \$250 and \$300 an acre. This included first bottom lands. Defendant Hawthorne did not sign the contract.

Eugene R. Kean testified for defendants that he resided in Edinburg, Texas; was manager of the Valley Reservoir & Canal Company; that he had worked for the Standard Land Company from May, 1911, to July, 1913, as local manager at San Juan, Texas; was acquainted with Mr. Nutter; had known him practically all his life. He had some business relations with him in Texas for the Standard Land Company, and made a contract with him to put up sorghum cane. Kean, at Nutter's request, took him in the summer of 1912 to look at lots 8, 9, 10, 12 and 13, in block 14, south of San Juan. He did not show him lots in block 15. He went with Mr. Nutter and wife to show them the lands they said they bought from the Standard Land Company; went to the northwest corner of lot 10, block 14. After leaving the northwest corner of the lot, they drove east on the north side of lot 10, where there was a road. The resaca runs along the south side of the road. He took them down to the edge of the resaca, approximately 1,000 feet. He knew nothing about the contract between Nutter and the company. The division of lots 10 and

11 is a little to the south of the center of the resaca. The northwest corner of lot 10 is covered with water a portion of the time. It had water on it at the time he showed it to the Nutters. He pointed out the resaca as a part of their land.

H. P. Griffin, a civil engineer, testified for the defendants that he was familiar with the resaca and the vicinity of San Juan; that the lands along the resaca were usually the best drained lands; that the first lift lands in the resaca were good agricultural lands, and would raise corn, cotton, cane, alfalfa, frijoles, onions, cabbage, potatoes, lettuce and beans; that the yield of sugar cane was from 40 to 60 tons an acre.

There was much testimony of other witnesses, but none of it relates materially to the questions involved in this suit.

The evidence shows conclusively that the plaintiff was indebted in a large amount, which was secured by liens upon the lands in Nebraska. Foreclosures were about to be commenced against him. He was very anxious to exchange his equities for the land in Texas. He had made several trips to that country; had worked there for the defendant company near the land in question in harvesting its cane, and had a general knowledge of the country. He deferred the execution of his vendor's lien notes until he made further examination of the land to be conveyed to him. Finally, after such examination as satisfied him, he executed the notes. It therefore may be said to be somewhat doubtful if the evidence is sufficient to authorize a recovery. However, the jury determined that question in his favor, and on this appeal, if their verdict could in other respects be sustained, would be conclusive on that point. It seems clear from the evidence that the verdict was excessive. The amount of land covered by the resaca was about 35 acres, and the remainder of it was substantially as represented. Allowing plaintiff \$150 an acre for the 35 acres of waste land and \$1,350 for the 9 acres of shortage, he would

Powell v. Cone.

not, at most, be entitled to recover more than \$6,600. Therefore the verdict for \$18,806.79 cannot be sustained. This obviates the necessity of passing on the other questions presented by the record.

On the question of the market value of the Texas land, it may be said that the contract was for an exchange of lands, in which each party fixed a trading value on his land, and they should be bound thereby. The evidence clearly shows that the defendant company tendered plaintiff a deed for 201.72 acres of the land in question, and is ready to convey it to him.

We therefore hold that, unless the plaintiff files a remittitur of all the judgment except \$6,600 within 30 days, the cause will be reversed and a new trial awarded; but, if such remittitur is filed, a judgment for the above amount, with interest thereon from the date when it was rendered in the district court, will be affirmed.

JUDGMENT ACCORDINGLY.

SEDGWICK, J., concurs in the conclusion.

FAWCETT, J. The evidence does not sustain a recovery. The judgment should be reversed and the action dismissed.

RUSSELL S. POWELL, APPELLANT, v. TRENMORE CONE,
APPELLEE.

FILED DECEMBER 19, 1916. No. 18475.

1. Landlord and Tenant: LEASE: CONSTRUCTION: RENEWAL. A five-year lease giving lessee an option to renew it for a "like term or terms of years," and providing that such option shall be exercised within five years from date, entitles lessee to one renewal.
2. ———: ———: ———. Though a contract granting the right to remove sand and gravel from leased premises uses the term "lease and demise" in the granting clause, subsequent provisions may show that it was a lease for that purpose only.

APPEAL from the district court for Merrick county:
CONRAD HOLLENBECK, JUDGE. *Reversed, with directions.*

Elmer E. Ross and Martin & Bockes, for appellant.

Burkett, Wilson & Brown, F. A. Bald and Albert & Wagner, contra.

ROSE, J.

In a petition in equity plaintiff prays for the reformation of a written instrument, for its cancelation when reformed, and for an accounting by defendant. Under the contract in controversy defendant acquired from plaintiff the right to remove sand from a 40-acre tract of land in an abandoned bed of the Platte river near Central City for the compensation of 25 cents a car-load. Defendant by pleading and proof resisted reformation. The trial court declined to reform the written instrument and dismissed the suit. Plaintiff has appealed.

The writing signed by the parties is in part as follows:

"This lease entered into this twenty-fourth day of February, 1911, between R. S. Powell, party of the first part, and T. Cone, party of the second part, is as follows: Witnesseth, for and in consideration of one dollar paid to party of the first part by the party of the second part and in consideration of the covenants hereinafter set forth by the party of the second part, or assigns, the party of the first part does by these presents lease and demise to the party of the second part the following tract of land situated in Merrick county, Nebraska, containing 40 acres, more or less, lying immediately north of the present north bank of the Platte river and immediately east of the present right of way of the Chicago, Burlington & Quincy Railroad, where said railroad crosses the Platte river, and being a plat of land that was a part of the old river bed of the Platte river, to have and to hold the same to the said party of the second part, without any liability or obligation on the part of R. S.

Powell v. Cone.

Powell or assigns of making any improvements of any kind thereon for the benefit of the party of the second part upon or about said premises, for the term of five years from this date, to February 24, 1916: Provided that R. S. Powell reserves the right to stock the waters thereon with fish, to use and improve said premises as a pleasure resort, either private or public, and to pasture the same, so long as such occupancy by R. S. Powell shall not interfere unreasonably with the occupancy of said premises by the party of the second part in handling sand and gravel thereon and the removal of them therefrom.

"It is further agreed between the parties hereto that the party of the second part shall have the right to construct railroad tracks, and erect such derricks and buildings upon these premises as may be necessary in handling sand, gravel, etc., and to removal therefrom, and party of the second part shall have the right to remove such improvements during the life of, or at the expiration of, this lease.

"It is further agreed that the party of the first part gives to the party of the second part the option to renew this lease under like conditions for a like term or terms of years, but the party of the second part shall exercise such option within five years from date hereof.

"The party of the second part, in consideration of leasing the premises as herein set forth, covenants and agrees with the party of the first part to pay to the party of the first part, or assigns, the sum of twenty-five (25) cents per car-load for each and every car-load of material taken from said premises during the life of this lease or the renewal thereof."

One provision which plaintiff seeks to reform is as follows:

"It is further agreed that the party of the first part gives to the party of the second part the option to renew this lease under like conditions for a like term or terms

of years, but the party of the second part shall exercise such option within five years from date hereof."

Plaintiff's contention seems to be that the term of defendant, under the agreement in fact made, was the definite period of five years, with the privilege of extending it five years more, "if entirely satisfactory to both parties." According to the undisputed evidence, a renewal option was discussed before the instrument was executed. The quantity of sand on the premises owned by plaintiff and the magnitude of the enterprise contemplated by defendant made the privilege of renewal an important factor. Plaintiff admitted on the witnessstand that defendant in his negotiations had mentioned the subject of renewals. The option, in the form appearing in the written instrument, was read to plaintiff before his signature was attached. On the question of fraud or mistake the proof does not warrant a reformation authorizing plaintiff, if dissatisfied, to oust defendant after an occupancy of five years. The parties made provision for a renewal option "under like conditions for a like term or terms of years." The privilege of renewal for the definite period of a "like term" of five years is not defeated by the indefinite phrase "or terms of years." The entire grant for a "like term or terms" is qualified by the clause, "but the party of the second part shall exercise such option within five years from the date hereof." Taken as a whole, therefore, the agreement for a renewal grants one option only, to be exercised within five years from the date of the contract. This construction requires the parties to respect the right of renewal for the five-year term specifically described, but does not sanction indefinite renewals without limit. *Winslow v. Baltimore & O. R. Co.*, 188 U. S. 646; *Tischner v. Rutledge*, 35 Wash. 285; *Drake v. Board of Education*, 208 Mo. 540; *King v. Wilson*, 98 Va. 259; *Syms v. Mayor*, 105 N. Y. 153.

The ice on the ponds created by the excavations made in removing sand is also the subject of controversy,

both parties claiming it. In this respect defendant seems to be in the wrong. The contract does not specifically mention ice, and nothing is said about compensating plaintiff for it. While the words "lease and demise" are used in the granting part of the contract in connection with the 40-acre tract of land described, the grant itself is limited by provisos, reservations and other provisions indicating that the parties meant to execute a lease for the removal of sand and gravel and for the occupancy and use necessary for that purpose. Plaintiff reserved the right to stock the waters with fish and to use and improve the premises for a pleasure resort. These reservations, in connection with the instrument as a whole, include control of both water and ice for those purposes. Defendant drew the instrument and protected himself from the reservations mentioned by forbidding unreasonable interference with his right to handle and transport sand and gravel, but inserted nothing in regard to ice. The conclusion is that he is not entitled to it. The preponderance of the oral evidence is in harmony with this interpretation of the contract.

Defendant constructed on the premises and operated a plant for the manufacture of cement products, and this enterprise is also a subject of controversy. For reasons already suggested, the use of plaintiff's land for such a purpose is not authorized by the lease. Defendant did not obtain oral permission to operate a manufacturing plant, and the evidence will not justify a finding that plaintiff's right to enjoin him from doing so is defeated by estoppel. On this issue, however, plaintiff did not prove substantial damages and is entitled to nominal damages only. On the issue as to waste in defendant's use of the premises for the purpose of removing sand and gravel, plaintiff, under the evidence, is not entitled to any relief.

The judgment is therefore reversed and the cause is remanded to the district court, with instructions to enter a decree conforming to the views herein expressed.

REVERSED.

KALMAN KAPLAN, APPELLEE V. CITY OF OMAHA, APPELLANT.

FILED DECEMBER 19, 1916. No. 19763.

1. **Appeal: FINAL ORDER.** In an action to recover damages for personal injuries, the overruling of a motion by defendant to bring in as an additional defendant another wrongdoer, alleged to be liable to the former as an indemnitor, is not a final order in the sense that it is appealable. Rev. St. 1913, sec. 8176.
2. **Trial: NEW PARTIES.** The statute providing that, "when a determination of the controversy cannot be had without the presence of other parties, the court must order them to be brought in," applies to cases where "there are persons, not parties, whose rights must be ascertained and settled before the rights of the parties to the suit can be determined." Rev. St. 1913, sec. 7604.
3. **Action for Tort: NEW PARTIES.** In an action to recover damages for personal injuries, a wrongdoer who may be liable to defendant as an indemnitor need not be made an additional defendant under the statute providing that, "when a determination of the controversy cannot be had without the presence of other parties, the court must order them to be brought in." Rev. St. 1913, sec. 7604.

APPEAL from the district court for Douglas county:
LEE S. ESTELLE, JUDGE. *Appeal dismissed.*

John A. Rine, for appellant.

Smyth & Schall, E. P. Smith, J. E. Von Dorn and Sutton, McKenzie, Cox & Harris, contra.

ROSE, J.

This is a motion by plaintiff to dismiss an appeal by defendant from an order overruling the latter's motion to bring in additional parties defendant.

Plaintiff commenced the action against the city of Omaha to recover damages for personal injuries caused by a failure to properly fill and guard an excavation for a sewer. Instead of answering, the city filed a motion to bring in its contractor and his surety as additional parties defendant, on the ground that the contractor had

Kaplan v. City of Omaha.

agreed to indemnify the city against such a claim. The contractor resisted the motion and it was sustained, but later the order was vacated and the motion overruled. Defendant has appealed.

Is the order appealable? The statute provides: "An order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment is a 'final order' which may be vacated, modified or reversed, as provided in this chapter and chapter 19." Rev. St. 1913, sec. 8176.

Is the order overruling the motion to bring in additional parties defendant an order which "in effect determines the action and prevents a judgment?" Ordinarily such a ruling does not determine the action and prevent a judgment, and therefore is not appealable. *Smith v. Scott*, 93 Wis. 453; 3 C. J. p. 477. A judgment determining the liability of the city to plaintiff may be rendered in this action, unless the contractor is an indispensable party thereto. Unless the controversy between the city and its contractor must first be determined, the order from which the appeal is taken does not in effect terminate the action and prevent a judgment either for or against the city. The city contends that it was the imperative duty of the trial court to make an order bringing in the contractor and his surety as additional defendants under the following statutory provision:

"The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a determination of the controversy cannot be had without the presence of other parties, the court must order them to be brought in." Rev. St. 1913, sec. 7604.

This section is practically a copy of a provision of the New York Code and has been construed by the courts of that state. It is declaratory of a well-established equity rule. The words, "when a determination of the contro-

Kaplan v. City of Omaha.

versy cannot be had without the presence of other parties," apply to cases where "there are persons, not parties, whose rights must be ascertained and settled before the rights of the parties to the suit can be determined." *M'Mahon v. Allen*, 12 How. Pr. (N. Y.) 39; *Chapman v. Forbes*, 123 N. Y. 532; *Bauer v. Dewey*, 166 N. Y. 402; *Merchants Trust Co. v. Bentel*, 10 Cal. App. 75; *Kresge v. Maryland Casualty Co.*, 154 Wis. 627.

The present action is brought to recover damages for a tort. If the negligence of the contractor in performing the work was the cause of the injury, both the city and the contractor are liable; but such a liability is both joint and several. While plaintiff might have sued the city and the contractor in the same action, it was not necessary for him to do so. He may not be concerned in the question of the city's right to indemnity from the contractor. *City of Peoria v. Simpson*, 110 Ill. 294. That question may be settled after the action by plaintiff is determined. His right to a judgment against the city does not depend upon a determination of the contractor's liability as an indemnitor. He should be allowed to proceed against the city without the presence of other parties, since he has elected to do so.

Defendant relies upon *Phoenix Mutual Life Ins. Co. v. City of Lincoln*, 87 Neb. 626. In that case there was a stipulation as to the amount of damages sustained by plaintiff, and the action was treated by the reviewing court as a friendly suit to determine who should pay them after hearing all parties interested. It should be considered in that light. No change in the rules of law governing actions against wrongdoers was intended.

The order from which defendant attempted to appeal was not appealable. The appeal is therefore

DISMISSED.

Bosler v. Modern Woodmen of America.

IDA MULVANEY BOSLER, APPELLEE, v. MODERN WOODMEN
OF AMERICA, APPELLANT.

FILED DECEMBER 19, 1916. No. 18662.

1. **Insurance: FORFEITURE: VIOLATIONS OF LAWS.** A provision in a certificate of membership in a fraternal beneficiary society that, if the death of a member holding such certificate shall occur in consequence of any violation or attempted violation of the laws of any state or territory or of the United States, "then the certificate shall be null and void and of no effect," is a reasonable and lawful provision.
2. ———: ———: ———. And where the holder of such a certificate, while he is in the act of committing a violent and unprovoked assault upon another, is shot and killed by the person whom he is assaulting under the conditions described in the opinion, no recovery can be had by his beneficiary upon such certificate.
3. **Evidence: WITNESSES: INTEREST.** And, in such a case, the fact that the slayer is the only eyewitness of the killing, and is the only witness who testifies to the facts leading up to the act, will not permit the jury to disregard his evidence on the ground of personal interest, when his testimony is corroborated by another disinterested, credible witness, and by facts and circumstances established at the trial.

APPEAL from the district court for Lancaster county:
P. JAMES COSGRAVE, JUDGE. *Reversed.*

T. S. Allen and Truman Plantz, for appellant.

J. A. Brown, contra.

FAWCETT, J.

Defendant is a fraternal beneficiary society, and Lawrence Mulvaney, deceased husband of plaintiff, was at the time of his death a member in good standing. On December 6, 1908, while engaged in a controversy with one James Finley, Mulvaney was shot and instantly killed by Finley. Plaintiff, as the beneficiary named in the certificate of membership of her husband, recovered judgment in the district court for Lancaster county for the full amount thereof. Defendant appeals.

Bosler v. Modern Woodmen of America.

The defense interposed by the defendant society is based upon the following clause in the certificate of membership: "If the member holding this certificate shall be expelled from this society, * * * or if his death shall occur in consequence of a duel, or of any violation or attempted violation of the laws of any state or territory or of the United States, * * * then this certificate shall be null and void and of no effect, and all moneys which have been paid and all rights and benefits which may have accrued on account of this certificate shall be absolutely forfeited and this certificate become null and void." It is alleged that the death of Mulvaney occurred in consequence of a violation by him of the laws of the state of Wyoming, in that on December 6, 1908, in Natrona county, Wyoming, Mulvaney committed an assault upon Finley, and Finley, while defending himself from this assault, shot and killed Mulvaney; that the assault was in violation of the laws of the state of Wyoming. Section 4957, Rev. St. 1899, then in force, provides: "Whoever, having the present ability to do so, unlawfully attempts to commit a violent injury on the person of another, is guilty of an assault and shall be fined in any sum not exceeding fifty dollars."

The evidence shows that Mulvaney was engaged in the sheep business in Wyoming, and was grazing his sheep near the North Platte river. Finley was employed by one Josendal, a sheep raiser, to move his herder's camp from place to place and to provide provisions for the herder. In the performance of his duty, he moved Josendal's camp so as to locate it near what was called the Bryan homestead, which was also located on the Platte river, and which Josendal had leased. Finley proceeded north from Alcova for a certain distance, then turned off the main road up a draw, in which it appears Mulvaney's camp was located, and about noon pitched his camp about two miles from the river, and about a mile beyond Mulvaney's camp. His outfit consisted of a sheep wagon, a supply wagon, four draft horses and a

saddle horse. The sheep wagon was so constructed that the bed of the wagon projected over the wheels, so as to make it about six feet wide. It was covered with a canvass top, and had a window at the rear and a door in front. The door was about two feet wide and a little to the left of the center of the front. Near the front of the room thus created, and to the right as one entered, there was a stove, upon which the occupant cooked his meals. A bed was located across the rear of the room. In addition to the bed and stove, the wagon contained a few cooking utensils and provisions. The only eyewitness to the killing was Finley. He was called as a witness for defendant, and testified substantially as follows: On the day in question he pitched his camp about a mile from Mulvaney's camp. About half an hour after locating his camp, he saw Mulvaney, with whom he was well acquainted, approaching on horseback. At that time he (Finley) was in his camp wagon. He had started a fire in the stove in his wagon to melt ice and to prepare lunch for himself. When Mulvaney rode up, he saluted Finley, "How are you, Jim?" and Finley answered, "How are you, Mulvaney?" Mulvaney rode up close to the end of the tongue of the wagon in which Finley was standing, got off his horse, and then said to Finley: "Don't you think you are coming in pretty close?" The following questions and answers in Finley's examination explain what occurred: "Q. What did you say? A. I said, 'No; Josendal has a right to water at the Bryan homestead, and I could not very well get to water there, and if I set further down I was crowding you and Ed. Royce, and be in between you, and I thought if I got down here I would be out of the way.' He said, 'I am taking all I am going to do off from this outfit,' and said, 'I am going to give you the worst beating I have given anybody.' Q. What did he do? A. He took off his coat and gloves, and threw them on the ground. Q. What did he say? A. And started for the wagon. I said, 'I can't fight you, and I don't want any trouble, and I

want you to go off and let me alone.' Q. How near did he come? A. Got up on the doubletrees; they are fastened on the wagon in front. Q. What did you say? A. I pulled my gun and I said. 'Mulvaney, don't come in here or I will shoot, sure.' Q. Did you point the gun at him? A. Yes, sir. Q. What did he do then? A. He hesitated on the doubletrees a second or so, and then started into the wagon, kind of crouching down. Q. What did you do? A. I pulled the trigger. Q. How did he appear when he was coming into the wagon? A. Well, he appeared pretty mad. Q. And were you afraid of him? A. Yes, sir. Q. Why were you afraid of him? A. Well, I am not a fighting man, and I never had a fight in my life, and I knew he was able to handle me any way he wanted to. Q. And from his appearance and conduct, you knew he was mad? A. Yes, sir. Q. And did you think he intended to do you bodily harm? A. Yes, sir. Q. You did? A. Most assuredly, he intended to. * * * Q. You had known Mulvaney for some time? A. Yes, sir; two or three years. Q. Had you ever lived with him in a sheep wagon? A. Yes, sir. Q. You may state whether or not he knew your physical condition? A. Yes, sir; he must have known it. We slept together and he could see the truss. Q. After you fired the shot, what then happened to Mulvaney as you saw? A. He still kept coming. Q. Did he fall? A. He started to fall. Q. In the wagon? A. Yes, sir. Q. What did you do? A. I brushed by him, and got on my horse. Q. Then what did you do? A. I went as hard as I could to Alcova." On reaching Alcova he reported what had occurred, and requested one or two parties and also a physician to go out to the camp and ascertain the condition of Mulvaney, stating to them that he thought he had killed him. He then surrendered himself to the deputy sheriff, and told him the same story.

If this testimony of Finley is to be believed, the defense of the society was fully established. Is there anything in the record that would justify the jury in

disbelieving it? Within a day or two after the occurrence, a coroner's jury was called. The jury visited the scene of the tragedy, took the testimony of Finley and other witnesses, and held Finley blameless. It has been said in discussion that the fact that Finley was held blameless by the coroner's jury does not free him from prosecution for the killing of Mulvaney, but that he may yet be prosecuted for that act, and that he has, therefore, a great motive for fastening upon Mulvaney the blame for his own death. While it may be seriously doubted that a jury in a civil action has the right to absolutely discredit the uncontradicted testimony of a competent witness, even if it has no corroboration, we need not decide that point, for the reason that, if that were to be conceded, it would not justify the rejection of Finley's testimony in this case. His testimony is strongly corroborated by conceded facts and circumstances, and by the testimony of the witness Holden Peterson. Mr. Peterson testified that both Finley and Mulvaney were friends of his; that he remembered the time when Mulvaney was killed; that in the afternoon of the day he was killed Mulvaney came to his blacksmith shop to get something that witness had been fixing for him; that he was on horseback; that "he seemed very much excited and angry, and when I asked him about a certain sheep wagon which was in the road, and asked if it did not belong to Finley, who was working for Josendal, he said it did, and that Finley was——." He testified to the vilest kind of a name imaginable that Mulvaney applied to Finley, and, continuing, said: "And that if he saw him today he would tell him so. He was always a quick acting and moving man, and jumped on his horse and rode off in a hurry. I thought he was very angry from the way he acted. He was at my place not more than an hour before the time he was shot by Finley, according to what I learned at the inquest of the time of the shooting."

Here is positive proof as to Mulvaney's feeling toward the man whom he assaulted an hour later. What about the circumstances corroborating Finley's testimony? Finley was in his own camp. Mulvaney, whose camp was a mile at least away, appeared upon the scene. After the salutations, "How are you, Jim?" and "How are you, Mulvaney?" he alighted from his horse and opened the affray with the question above quoted, "Don't you think you are coming in pretty close?" and made the threat that he was going to give Finley the worst beating he had ever given anybody. Why did Mulvaney go from his own camp to Finley's? The reason for his going is shown in the testimony given by Mr. Peterson, who said he was "very much excited and angry." Although the land on which Mulvaney was camped was government land, he resented any imagined encroachment upon his domain by other sheep men, and decided he would put an end to it by giving Finley a beating that would cause him to move on. In addition to the fact that he is shown to have been in an angry mood, and that he had gone from his camp to the camp of Finley, we have the corroborating testimony of witnesses, to whom Finley reported the shooting, and who immediately went to the scene of the tragedy, that they found Mulvaney lying with his face down, just inside the door of Finley's wagon. This corroborates the testimony of Finley that at the time he pulled the trigger he (Finley) was at the rear end of the room, close to his bed, and that Mulvaney had entered, or was in the act of actually entering, the room, when he fired. His testimony is that he was just inside of the door of the wagon, and Mulvaney was up to the double-trees when he first warned him "to go off and let me alone;" that, when he fired and Mulvaney fell inside of the wagon, he had to brush past him as he rushed out. It is apparent, therefore, that Finley had retreated until, figuratively speaking, his "back was against the wall." Finley's wagon was at the time his dwelling. It was his castle. He had a right to stand his ground in that castle

and defend it from all assailants, even to the extent of taking his assailant's life. But, it is said in argument, Mulvaney was not armed himself; that he undoubtedly intended to commit an assault upon Finley (he was already committing an assault, and intended to commit a severe battery) without use of weapons of any kind, and he could not apprehend that a deadly weapon would be used against him by Finley, and had no reason to believe that his death might result from his encounter with Finley. We are unable to understand how Mulvaney could not apprehend that a deadly weapon would be used against him by Finley, when Finley was standing with a gun leveled at him, telling him that, if he attempted to enter the wagon, he would shoot. Nor are we able to understand how it can be said that Mulvaney had no reason to believe that his death might result from his encounter with Finley. If he did not believe that Finley would shoot, why did he crouch down and make a rush? The argument is unsound. To hold in line with the contention above outlined would be to declare the rule in this state to be that, when a man is standing inside the threshold of his own house, and a rival in business appears upon the scene, tells him he is going to give him a severe beating, starts up the front steps for the purpose of carrying his threat into execution, the occupant of such home may not defend it, or himself, with a gun if necessary, but must engage in a personal physical encounter with his assailant in his own home. We are unwilling to establish such a rule. In *Hoover v. De Klotz*, 89 Neb. 146, 148, we held: "This court is not committed to the doctrine that a person unlawfully assaulted must fly to the wall before he may lawfully strike a blow in self-defense, but, on the contrary, we have said as a general proposition that a person unlawfully assaulted may stand his ground and repel force by the exercise of such force as to him reasonably seems necessary to protect his person or property from injury."

In addition to what has been said upon the merits of the case, there is prejudicial error in the instructions given by the court. The question for the jury to determine was: Did Mulvaney's death occur in consequence of his violation or attempted violation of the laws of the state. Prize-fighting is now a violation of the law in nearly every state in the Union. Surely, no one will claim that the holder of a certificate in defendant society could engage in a prize-fight, meet his death while so engaged, and the society be held liable because his opponent struck him a needless blow which killed him. The society in such a case would be released from liability for the member's death, by reason of his violation of the laws of the state, and not by reason of anything his antagonist may have done.

By instruction No. 8 the jury were instructed: "If a person shoots another who assaults him through mere cowardice, or under circumstances which the jury find from the evidence are not sufficient to induce a reasonable and well-grounded apprehension in the mind of an ordinarily courageous person of danger to life or great bodily harm, the law will not justify the shooting on the ground of self-defense, and in this case, if you find that under this rule Finley was not justified in shooting Mulvaney, then your verdict should be for the plaintiff."

By No. 9 the jury were instructed: "That before a person can justify the taking of the life of a human being on the ground of self-defense, he must, when attacked, employ all reasonable means within his power, consistent with his own safety, to avoid the danger and avert the necessity of killing. And if in this case the jury find from the evidence that Finley might reasonably have repelled the alleged assault of Mulvaney with his hands or feet or other weapon within his reach, less deadly than the revolver, then the shooting of Mulvaney was not justifiable as a matter of self-defense."

Bosler v. Modern Woodmen of America

No. 10 reads: "Gentlemen of the jury, the court instructs you that the alleged assault by the deceased would call for a repulsion of it on the part of Finley by just such force as was necessary to overcome it, and more than that would be unlawful. And if the jury find from the evidence that the alleged assault by Mulvaney was in fact repelled by more force on the part of Finley than was actually necessary, then the killing of Mulvaney by Finley would not be justifiable, and the plaintiff would be entitled to recover the full amount of the benefit certificate."

That the defense pleaded by defendant, under the terms of its benefit certificate, is a valid defense, and that under the evidence it should have been sustained, is fully shown in *Travelers Ins. Co. v. Seaver*, 19 Wall. (U. S.) 531; *Murray v. New York Life Ins. Co.*, 96 N. Y. 614; *Bloom v. Franklin Life Ins. Co.*, 97 Ind. 478; *Gresham v. Equitable Accident Ins. Co.*, 87 Ga. 497; *Davis v. Modern Woodmen of America*, 98 Mo. App. 713; and by the numerous authorities cited in those cases.

The court also committed prejudicial error in not giving instructions 9 and 10, requested by defendant. They correctly state the law as shown by the cases above cited, and are in harmony with the evidence adduced at the trial. A case very much in point is *Woodmen of the World v. Hipp*, 147 S. W. (Tex. Civ. App.) 316.

The judgment of the district court is reversed and the cause remanded.

REVERSED.

ROSE, J., dissents.

In re Estate of Getchell.

IN RE ESTATE OF SARAH A. GETCHELL.

FRANK G. CARRIER, APPELLEE, v. MELVIN GETCHELL,
APPELLANT.

FILED DECEMBER 19, 1916. No. 18960.

1. **Domicile.** Where the owner of a home in one county sells the same, with the intention of removing to another county, reserving the right to store his furniture in one room of such house until he can arrange for such removal, and shortly thereafter goes to another county, rents a house there for the purpose of removing thereto and making it his home, immediate possession of one room in such house to be given him, and possession of the entire house to be given about six weeks later, and subsequently completes such transaction, at the time appointed, by removing his household effects from his former home to the new one, such final act of removal will relate back to the time he rented the house in the second county, and his residence and that of his wife in such second county will date from the time when he rented such house for the purpose and with the intention of removing thereto and making that his family home.
2. **Executors and Administrators: ADMINISTRATION: JURISDICTION.** And, in such a case, where the wife dies before such final act of removal takes place, and it clearly appears that the delay of a few weeks in removing from the old home to the new was not occasioned by any doubt as to the ultimate removal to the new home, but was caused solely by the illness and death of the wife, and the husband, shortly after his removal to the new home, in good faith applies for and obtains letters of administration on the estate of his deceased wife in the county court of the county to which he has removed, and such estate is in due form fully administered in such court, such administration will be sustained.

APPEAL from the district court for Cuming county:
GUY T. GRAVES, JUDGE. *Reversed and dismissed.*

J. F. Boyd, for appellant.

A. M. Emley, contra.

FAWCETT, J.

Plaintiff filed in the county court of Cuming county
a petition for letters of administration on the estate of

In re Estate of Getchell.

Sarah A. Getchell, deceased. Defendant, the surviving husband of decedent, resisted the application on the ground that her estate had already been fully administered in Antelope county. His objections were overruled, and an appeal was taken to the district court, where he was again unsuccessful.

The only question involved in the case is: Was Mrs. Getchell, at the time of her death, a resident of Antelope or Cuming county? The evidence is undisputed. It shows that some time in 1906 the defendant and his wife removed from Neligh, in Antelope county, to Wisner, in Cuming county, where a home was purchased, in which they resided until about January 4, 1910, at which time they sold the property and gave possession of the same to the purchaser, except as to one room in which they stored their furniture, under an arrangement that they might keep it there until they decided upon a new location. They then went to reside, temporarily, with a daughter in Wisner. Some time during the same month defendant went to Neligh, in Antelope county, and while there rented a house for the purpose of removing to that city. At the time he rented the house it was occupied by another tenant whose tenancy would not expire until March 1. He made arrangements with this tenant for immediate possession of one room, in which to store the furniture which he then had stored in his old home in Wisner, until he should receive possession of the entire house on the date named. While defendant was at Neligh, or immediately upon his return to Wisner, Mrs. Getchell was taken ill, and on February 14 she died. On March 1 defendant obtained possession of the house in Neligh, which he had rented in January, and moved his furniture from Wisner thereto. In April he applied to the county court of Antelope county for letters of administration on his wife's estate. His petition was granted, and by subsequent proceedings, the regularity of all of which is not disputed, the estate was fully settled and the administrator discharged.

In re Estate of Getchell.

We think the evidence shows that when defendant sold his home in Wisner he did so for the purpose and with the intention of removing from Cuming county, and that when he rented the house in Neligh it was with the intention of making that his home. In accordance with that intention he arranged for the immediate possession of one of the rooms, and for possession of the entire house on March 1. He subsequently carried that intention into effect by moving into the house he had rented in Neligh, at the appointed time. He thereby changed his residence from Wisner, in Cuming county, to Neligh, in Antelope county. The final act of removing his furniture from Cuming to Antelope county was simply one of the parts of a single transaction. It completed the intended removal, and related back to the time when he rented the home in Neligh, with the intention of removing thereto. That in making this arrangement for the transfer of his residence he was acting for himself and the decedent is clear. That he acted in good faith in administering the estate in Antelope county is also clear. In the light of these facts, the county court of Antelope county was the proper court in which to administer the estate of his deceased wife. The fact that, on account of her illness, he did not immediately remove the furniture from the room in which it was stored in Cuming county to the room in his new home which he had rented in Antelope county is immaterial, as it clearly appears from the evidence that this delay was not occasioned by any doubt as to the ultimate removal to Neligh, but was caused solely by his wife's illness.

The judgment of the district court is reversed and the petition for letters of administration in Cuming county dismissed.

REVERSED AND DISMISSED.

LETTON and ROSE, JJ., not sitting.

In re Estate of Getchell.

SEDGWICK, J., concurring.

Some weeks before the death of his wife, Melvin Getchell sold the house where they were living in Cuming county, and himself and wife gave possession thereof to the purchaser, reserving one room in which they stored their furniture. He then went to Neligh, in Antelope county, and rented a house of which he could not get complete possession for a few weeks, but took possession of a room therein. While these negotiations were pending, and on the 14th day of February, Mrs. Getchell died in Cuming county. A few days later Mr. Getchell removed his furniture to the house he had rented in Neligh and continued to reside in that county. These circumstances, as appears from the opinion and the dissenting opinion, presented a nice question of law as to at what point of time Mr. Getchell changed his residence from Cuming county to Antelope county. He might well have been in doubt as to which was the proper county in which to settle the estate of Mrs. Getchell. He concluded that he should apply for settlement of the estate in Antelope county where he was living. All parties interested might well have taken notice that this would probably be his conclusion. No objection was made, and the estate was duly settled by the court of that county. Four years later application was made by a son of Mrs. Getchell to the court of Cuming county to settle Mrs. Getchell's estate, ignoring the proceedings in Antelope county. Over the objections of Mr. Getchell, that court proceeded with the matter, and, upon appeal to the district court of that county, the action of the probate court was sustained.

Of course, the jurisdiction of the probate court of Antelope county depended upon the legal residence of Mrs. Getchell being in that county, and that depended upon the question of fact as to whether Mr. Getchell had changed his legal residence before the death of Mrs. Getchell. This question was necessarily submitted to the county court of Antelope county, and that court found the fact to be that Mr. Getchell had changed his residence to that county before Mrs. Getchell's death.

In re Estate of Getchell.

The son might anticipate that some action would be taken to settle the estate within four years after Mrs. Getchell's decease. The facts determining jurisdiction must have been litigated in that proceeding. After allowing the expense of the first proceeding to be incurred, and waiting for four years, the son should not now, in this collateral way, be allowed to retry the facts upon which jurisdiction depends. I concur in reversing the judgment of the district court.

MORRISSEY, C. J., dissenting.

Melvin Getchell and his wife had been residents of Cuming county for a number of years. February 14, 1910, Mrs. Getchell died in that county. Getchell, the husband, claims that in January preceding the death of his wife he went to the city of Neligh, in Antelope county, and leased a house which was then occupied by another family. He says he was unable to secure possession at once, but that an arrangement was made whereby he might ship his furniture and store it in a couple of rooms in this house, but he admits that the furniture was not shipped, and that he did nothing further than this toward establishing a residence in Antelope county until after the death of his wife. At the time of her death the furniture was still in Cuming county. Getchell took out letters of administration in Antelope county, alleging that his wife died a citizen of that county. Later, one of her heirs applied for letters in Cuming county. These letters were granted over Getchell's objections, and he took an appeal to the district court. His objections were overruled, and he brings the case here.

The majority opinion reverses the judgment of the district court, and, in effect, holds that, although Mrs. Getchell had done nothing during her lifetime to transfer her residence from Cuming county to Antelope county, the mere intention on the part of the husband to change the family residence is sufficient to change the residence of the wife. Under such a holding a married woman may

Wiseman v. Carter White Lead Co.

never know the place of her domicile. Being unable to know what her husband has in mind, she will be unable to say that he has not formed the intention to remove the family to some distant place. It seems to me that the judgment of the district court is clearly right. This woman had no residence in Antelope county, could not have been found there, was not there, died before her husband went there to live, and the judgment of the district court ought to be affirmed.

HOWARD WISEMAN, APPELLEE, v. CARTER WHITE LEAD
COMPANY, APPELLANT.

FILED DECEMBER 19, 1916. No. 19039.

1. **Master and Servant: DANGEROUS EMPLOYMENT: DUTY OF MASTER.** Where a master employs a servant to work in a room in which the air is impregnated with poisonous dust and fumes, which, when inhaled, are liable to result in permanent or serious impairment of health, it is the duty of the master to fully caution the servant as to such danger and advise him as to the serious consequences that may result therefrom; and this duty is not fully performed by merely furnishing the servant an appliance to be worn over the mouth and nose for the purpose of preventing or minimizing such danger, without instruction as to the danger of failure to constantly wear the same. Nor will the master be excused from the performance of such duty by the fact that the servant may have some degree of knowledge of the dangerous character of the employment, but does not understand or fully appreciate its nature or extent, or the serious consequences liable to result therefrom.
2. **Evidence** referred to in the opinion examined, and *held* sufficient to sustain the verdict.
3. **Instructions** referred to in the opinion examined, and *held* free from error.

APPEAL from the district court for Douglas county:
CHARLES LESLIE, JUDGE. *Affirmed.*

Montgomery, Hall & Young, for appellant.

Gurley & Fitch, contra.

FAWCETT, J.

From a judgment of the district court for Douglas county, in favor of plaintiff, in an action for personal injuries, defendant appeals.

The petition alleges that plaintiff commenced work as a laborer in defendant's plant at East Omaha, June 24, 1913; that, in the process of manufacturing white lead, poisonous dust permeates the air, making work dangerous for those working therein, but plaintiff was not aware of such danger, and was not informed thereof by defendant; that plaintiff was poisoned by the lead fumes, and contracted plumbism, which caused him to become permanently sick, and to suffer pains incapacitating him for work, all to his damage in the sum of \$10,000. The answer denies all allegations in the petition, and alleges that, if plaintiff suffered injuries from his work, the same were caused by his failure to exercise ordinary care for his own safety, his failure to properly wear and use the appliances furnished by defendant to prevent the inhalation of poisonous dust and fumes, and in failing to observe the instructions and rules of the defendant for the safeguarding of his health, and that his injuries, if any, are and were owing to his own carelessness and negligence; that plaintiff was informed of all dangers and risks of the work, and that these were obvious and known to him; that he therefore assumed all risk while engaged in the work; that the appliances furnished him were those in general use in lead factories, and were fit and proper to conserve his health if he had exercised due care for his own safety. The reply was a general denial. The jury returned a verdict in favor of plaintiff for \$2,500, upon which judgment was entered.

The errors assigned are: (1) That the court erred in refusing at the close of the evidence to direct a verdict for the defendant, as such evidence shows that plaintiff assumed all risk of injury from lead poisoning while working in defendant's factory; (2) that the court

erred in giving instruction No. 4; and (3) that the court erred in its assumption in instruction No. 2 that there was any evidence whatever "that the defendant had knowledge or notice that the plaintiff was inexperienced in such work and did not know and appreciate the dangers thereof, if such dangers existed."

1. The evidence shows that plaintiff had formerly worked on a farm. On leaving the farm he obtained employment in the city of Omaha as a teamster. Later he obtained employment with the defendant. His first work was unloading coal for the company in the company yards. He then worked at handling pig lead bars, and a few days later was set to work in the blow room of the factory, firing a kettle where lead was boiled and blown. In this room the air was at all times more or less poisoned with lead fumes and dust. As to his employment in the blow room, he testified, substantially, that one of the men employed in that room quit work, and that in a conversation with the foreman who hired him "he asked me if I could handle that upstairs. I told him I didn't know; I never tried it; knew nothing of it. He says, 'You go up there in the morning. Go up this evening and put in the shingle so the night man' would build me a fire for the next day.'" He says he went up and put in the shingle as directed, and the next morning went to work in the blow room. When asked to describe the apparatus with which he worked, he answered: "A. Well, it is a kettle. The lead comes up on the carrier and is dumped into the kettle, and we have got to keep it so hot—the difference in the lead; some you will keep 700 degrees, and as high as 900, 950. You have a thermometer to go by. * * * Q. Describe the apparatus you call kettle a little more fully. A. Well, it is a large kettle. I don't know just what size it is. It stands up on a—well, kind of a foundation, and there is a nozzle in it goes into the tank, when the lead is hot it goes out that. You have a plug. You plug that up when you stop,

Wiseman v. Carter White Lead Co.

and when you pull the plug it goes out in there. It is blowed with 100 pounds by something. It is blowed into the tank, and you have three steps, a stairway of three steps you get up on to skim the dross off the kettle. You have got to keep the dross skimmed from the kettle." He testified that the kettle stands "better than waist high when you are on the floor by it there." He further testified that, before going to work in the blow room, he did not know anything about the disease called "plumbism" or lead poisoning, and that no one at the plant said anything to him, before he went at that work, about such a disease; that no one said anything to him about any danger connected with the work or contracting the poison. This testimony is controverted by the testimony of the foreman. The evidence further shows that the men engaged in that work were furnished with respirators, or "muzzles" as some of the witnesses called them. This appliance was worn over the mouth as a protection, defendant insists, against the inhalation of lead dust. Plaintiff testified that he knew it was dusty and dirty in the blow room, but did not think there was any danger from breathing the lead dust. There is some evidence that on two or three occasions he was seen without the respirator on, and was warned to put it on. His testimony is that he wore it at all times except when he went to a window for fresh air. These were all questions for the jury. Without recounting the testimony further, we cannot say that the trial court erred in holding it sufficient to warrant the jury in finding that plaintiff was set to work in the blow room under these dangerous conditions without sufficient warning or instruction from the defendant as to the latent danger incident to his employment, viz., the danger of lead dust or fumes causing the very serious disease which he subsequently contracted.

2. The complaint of instruction No. 4, covered by the second assignment, is that there was no evidence

that defendant knew plaintiff to be inexperienced in such work, and that it was error to give an instruction which implies that there is evidence from which the jury may find a fact of which there is no evidence before them. We think the evidence which we have outlined under the first assignment, as to what plaintiff said to the foreman when he was told to commence work in the blow room, is a sufficient answer to this complaint of instruction No. 4. In the light of that testimony, we do not think it can be held that "there was no evidence that defendant knew plaintiff to be inexperienced in such work."

3. The complaint under the third assignment is that the court erred in its assumption in instruction No. 2 that there was any evidence "that the defendant had knowledge or notice that the plaintiff was inexperienced in such work and did not know and appreciate the dangers thereof, if such dangers existed." Regardless of whether or not this would constitute a defense, it involves the consideration of conflicting evidence, which we feel constrained to hold is disposed of by the finding of the jury. It must be conceded that plaintiff knew that the conditions existing in the blow room were unusual. The fact that the men were wearing respirators, and that he also wore one, was sufficient to advise him of that fact, but, if his testimony is to be believed, he did not thereby know or realize that the inhalation of the lead fumes or dust would render him liable to contract the serious disease with which he was subsequently afflicted, and which the evidence shows he was liable to contract if he did not make a proper use of the appliances furnished. Under the authorities cited by appellee, plaintiff was not required to show entire ignorance of the danger to which he was exposed. He was entitled to a verdict and judgment if he satisfied the jury that he had some degree of knowledge of the dangerous character of the employment, but did not understand or appreciate its full nature or

extent. As said by the supreme court of California, in *Pigeon v. Fuller*, 156 Cal. 691: "He may, for example, have observed that the melted pig lead gave off fumes, and that dust arose from the white lead in the process of manufacture, and that this involved the possibility of some degree of discomfort or injury, without realizing or understanding that the very serious disorders from which he claims to be suffering were a probable consequence. In the face of appellant's contention, strongly urged even on appeal, that there is no danger in the employment in question, it can hardly be claimed that the plaintiff must, as matter of law, be held to have known that the inhalation of the fumes and dust had a tendency to produce lead poisoning, with its accompaniment of loss of teeth, paralysis and derangement of the digestive organs. This is not a fact of universal knowledge, nor was it necessarily apparent to one employed, even for a long time, in defendant's works. The risks assumed by a servant are only the ordinary risks of the employment. He does not assume the risk of hidden dangers which are, to the knowledge of the master, not apparent to him. (Citing cases.) There was ample evidence to warrant a finding that plaintiff, by reason of his prior experience, knew that some risk attached to work in a white-lead factory, but that, until he was suddenly stricken down, he had no conception of the real character or extent of the danger which he incurred." This discussion by the California court so aptly fits the case under consideration here that we deem further discussion unnecessary.

Finding no reversible error in the record, the judgment of the district court is

AFFIRMED.

Van Dorn v. Kimball.

MARTHA VAN DORN, APPELLEE, v. WILLARD KIMBALL,
APPELLANT.

FILED DECEMBER 19, 1916. No. 18837.

1. **False Imprisonment: BELIEF IN GUILT: QUESTION FOR JURY.** In an action for false imprisonment, if it appears that the defendant was instrumental in causing the arrest of the plaintiff upon a charge of felony, and that the plaintiff was not in fact guilty of the offense charged, it becomes an important question to be submitted to the jury, if the evidence is conflicting, whether the defendant had sufficient reason to believe and did believe that the plaintiff was guilty.
2. ———: **RESPONSIBILITY FOR ARREST: QUESTION FOR JURY.** In such case, if the officer who made the arrest in the presence of the defendant made a personal investigation of the fact as to plaintiff's guilt, and then communicated with his superiors before making the arrest, and the evidence is conflicting as to whether the arrest was made wholly upon the officer's responsibility or was caused by the defendant, it is proper to submit that question to the jury with proper instructions.
3. ———: **DAMAGES: QUESTION FOR JURY.** In such case, the question of the effect of such arrest upon the health or bodily condition of the person arrested is for the jury upon conflicting evidence, and their finding will not be disturbed upon appeal, except so far as the damages allowed, or some part thereof, are clearly unsupported by the evidence.
4. ———: ———: **EVIDENCE: HYPOTHETICAL QUESTIONS.** The fact that the arrest *might* cause the injury to plaintiff's health complained of is not conclusive that it did so; but it is important to know whether the arrest and the mental strain and worry caused thereby could under ordinary circumstances occasion the troubles which the plaintiff afterwards suffered, if there was other competent evidence tending to prove that, as a matter of fact, the physical troubles of the plaintiff were caused by the arrest and its accompanying circumstances. The use of the word "might" in a hypothetical question to a medical expert is not to be approved; but it would not of itself be considered so prejudicial as to require a reversal.
5. **Trial: REFUSAL OF INSTRUCTION.** The judgment of the trial court will not be reversed because of refusing a requested instruction which assumes the existence of a material fact upon which the evidence is conflicting.

Van Dorn v. Kimball.

6. ———: INSTRUCTIONS: NECESSITY OF REQUEST. Nor because it appears that a more detailed instruction might have been given upon the question of the responsibility of the defendant for some of the matters complained of, when no further instruction was requested by the defendant which would have been suitable under the circumstances.
7. INSTRUCTIONS complained of are found not to be so inconsistent as to require a reversal.
8. EVIDENCE: HYPOTHETICAL QUESTIONS. If the evidence is conflicting as to a material matter, the hypothetical question asked the expert witness is not objectional because it recites such matter as a basis for his opinion. It is for the jury to determine whether such an hypothesis is warranted by the evidence.
9. TRIAL: DAMAGES: PREJUDICE. The fact that the jury errs in its judgment of the amount of plaintiff's damages is not such conclusive evidence of prejudice as to admit of no other conclusion.

APPEAL from the district court for Lancaster county:
ALBERT J. CORNISH, JUDGE. *Affirmed on condition.*

Burkett, Wilson & Brown and Ralph P. Wilson, for appellant.

Claude S. Wilson and Homer L. Kyle, contra.

SEDGWICK, J.

The defendant complained to the police officers that this plaintiff had in her possession some property in which the defendant was interested, and a policeman was sent with the defendant to search for the property. They went to the house where the plaintiff was living, and there found some property that did not belong to the plaintiff and in which the defendant was interested, and the police officer required the plaintiff to accompany him to the station, which she did, and remained there for some time, and was allowed to go upon her promise to return the next morning. She returned the next morning, and after some examination was allowed to go home, with the statement by the officer that she need not return until she was called for. She began this action in the district court for Lancaster

county against the defendant to recover damages for an alleged false arrest. On the trial the jury found a verdict in her favor for \$10,000 damages. The trial court required her to remit one-half thereof, which she did, and judgment was entered in her favor for \$5,000, from which the defendant has appealed.

The plaintiff was conducting a rooming house, called in the record the "Q street house," and was or had been interested in another rooming house called the "R street house," which was under the direct management of a Miss Shockey. In this house the bed linen and some of the furniture and other articles were the property of Miss Shockey and were also leased by the defendant. Miss Shockey informed the defendant that some of her property in the R street house, consisting mostly of bed furnishings, had disappeared, and that she believed the plaintiff had taken them and had them in her Q street house where she lived. Upon this information, and perhaps other facts within his knowledge, the defendant complained to the police officers. The officers testified that the defendant suggested that the plaintiff should be arrested, and that they informed the defendant that they would not arrest the plaintiff upon the information given them by the defendant without a complaint and warrant. The officers suggested that they would send a policeman with the defendant and, unless the plaintiff objected to their searching her house, they might make such search for the missing articles. Thereupon the next day a policeman, Mr. Sides, was sent to the defendant's place of business, and he and defendant, taking with them Miss Shockey to identify the articles if found, went to the plaintiff's residence, and, she making no objection, they made a search of the house and found a considerable quantity of bed linen and other articles which they identified, and were conceded by the plaintiff, to be the property of Miss Shockey, in which the defendant was interested. The value of these articles so identified is variously estimated by

the defendant's witnesses at from \$50 to \$100. According to the plaintiff's evidence, the value is very much less. The plaintiff, through some contract between herself and the defendant, was or had been interested in the management of the R street rooming house, and the employees of the laundry where the washing for these two rooming houses was done testified that they supposed that the furnishings for both houses belonged to the plaintiff, and that it was immaterial to which house they were returned, and that articles were frequently received by them from one of the houses and returned to the other house. The plaintiff testified that she did not have the immediate care of the rooms and bedding in her house, that she had a housekeeper and help to attend to these matters, and that she was not aware that the articles had been so exchanged; and the evidence shows that at least some of the articles of the plaintiff, that were taken from the house that she occupied, were found immediately after she was arrested in the R street house where Miss Shockey resided.

The evidence wholly fails to prove that the plaintiff had committed any crime requiring her arrest and punishment. In this condition of the evidence, some of the important questions for the jury were whether the defendant, when he complained to the police officers, had sufficient reason to believe and did believe that the property belonging to Miss Shockey, in which he was interested, had been purposely taken by the plaintiff into her possession with the intention to feloniously convert it to the plaintiff's own use, and whether, acting upon that belief, he went to the plaintiff's residence with the police officer for the purpose of ascertaining the facts.

The defendant first appealed to the chief of police and requested that the plaintiff be arrested for the offense which he appears to have stated that she had committed. The police officer refused to arrest the plaintiff without a complaint and warrant, and the de-

Van Dorn v. Kimball.

fendant declined to make a complaint. Afterwards the chief of police decided to send an officer with the defendant to make investigations, and the officer, with the help of the defendant and Miss Shockey, made investigation, and thereupon the police officer called up the police headquarters by telephone, and after this conversation over the telephone the officer announced that the plaintiff would be arrested. One of the important questions of the case was whether the officer determined upon this arrest from what he had himself observed and instructions from headquarters independently of any wrongful act on the part of the defendant, or whether the arrest was brought about by the unjustified statements of the defendant. The evidence is not conclusive upon this point, but is of such a nature as to require it to be submitted to the jury.

There is some language in the petition that might lead one to think that the plaintiff was seeking to recover for slander for false statements made in regard to her character, but that question was entirely eliminated by the court. The case was submitted to the jury entirely upon the theory that the action was for unlawful arrest and imprisonment, and the jury by instruction were not allowed to consider any damages except those resulting directly from the arrest and imprisonment.

The defendant insists that the court erred in allowing answers to a hypothetical question. Dr. Walker had testified to the physical condition of the plaintiff, showing that the plaintiff had suffered considerably physically, and was then asked this question: "Assuming that prior to June 12 of that same year, five days prior to your examination of her, Mrs. Van Dorn was a strong, well woman, and assuming between the 12th day of June of that year and the 17th day, when you examined her, that she had undergone a severe mental strain by being arrested and confined in the police station of the city, state whether or not, under those conditions of mental worry

and strain, that *might* be the controlling feature of this trouble?" The defendant objected to this question principally on the ground that it was too indefinite; that it recites that the plaintiff "suffered a severe mental strain." The question was amended on the suggestion of the court by adding, "That she was confined in the police station, although not placed in a cell and not taken in the patrol wagon, but by an officer accompanying her through the streets of the city of Lincoln," and "I will also add, no handcuffs being placed on the prisoner, nor her body not touched except by the officer who assisted her at times when she appeared weak and needing his assistance," and "now, assuming this state of facts, what in your opinion, or what would you say in your opinion whether that might be the controlling features that caused the condition in which you found her on the 17th day of June, 1912?" The objection to the question was overruled, and the witness answered, "Well, it might."

The principal objection to this question discussed in the brief is that it required the witness to answer whether the arrest complained of might have caused the physical condition which the witness saw. Of course, the fact that the arrest *might* have caused that condition would not be at all conclusive. The question for the jury is whether it in fact did cause it; but it is important to know whether the arrest and the mental strain and worry caused thereby could under ordinary circumstances occasion the troubles which the plaintiff afterwards suffered, if there was other competent evidence tending to prove that as a matter of fact the physical troubles of the plaintiff were caused by the arrest and its accompanying circumstances. The form of the question in this respect is not to be approved, but it would not ordinarily of itself be considered necessarily so prejudicial as to require a reversal.

The defendant assumes that the only evidence in the record tending to show that the plaintiff's condition

as found by the physician was the result of the arrest was this evidence of Dr. Walker's that such arrest might have caused the condition. Of course, as already observed, such evidence of itself would not be sufficient; but it appears from the evidence of the police officer and others there, without contradiction, that, when the officer first informed the plaintiff that she would have to go to the police station, the plaintiff fainted and fell to the floor and remained unconscious for several minutes. The evidence also shows that before the arrest the plaintiff uniformly enjoyed good health, and that from the time of the arrest for several weeks she was in the condition described by the physician. While the evidence is not conclusive that this condition of the plaintiff was caused by the arrest, it was sufficient to require that question to be submitted to the jury.

The defendant complains of various instructions given by the court, and also of the refusal to give instructions requested by the defendant. The court instructed the jury: "If you should find from the evidence and under these instructions that the defendant did cause the arrest of the plaintiff, he would be liable for only such damages as resulted directly from such arrest, and would not be liable for damages that were not the usual or ordinary result of such an arrest, nor for such damages as could not have been anticipated by the defendant." There was some evidence tending to show that the plaintiff, after she was arrested, stated that she would have to change her clothes before she went with the officer, and that she was not allowed to go into another room to change her clothes, but was compelled to do so in the presence of the officer and others. This evidence was contradicted by several witnesses. The defendant insists that he was not present when this took place and had nothing whatever to do with that transaction, and that the court did not fully present this question to the jury in the instruction above quoted, and that the court erred in refusing to give the instruction upon that

point requested by the defendant, which was as follows: "You are instructed that, even though you should find from the evidence that the defendant requested the officers to arrest the plaintiff, this would not make the defendant liable for any acts done or indignities offered the plaintiff by the policeman after the arrest took place; there being no evidence that he either directed, requested, or ratified such alleged indignities." The requested instruction would tell the jury that there was "no evidence that he either directed, requested, or ratified such alleged indignities." The great preponderance of the evidence is that the defendant was not present when the plaintiff changed her clothing, and that he was not in any way connected with that transaction, and, if that was the only indignity offered to the plaintiff, the instruction requested by the defendant would no doubt have been given. There is, however, evidence of other indignities offered the plaintiff, and this evidence is strongly supported by the testimony of the police officer. The defendant accused the plaintiff of stealing, not only the articles for which they were searching, but other articles, such as a basket and bedstead, and enforced his charges with violent gestures toward the plaintiff. It would not have been proper for the court to have told the jury, under the evidence in this case, that the defendant did not direct, request, or ratify any indignities offered to the plaintiff. The court told the jury that the defendant "would be liable for only such damages as resulted directly from such arrest, and would not be liable for damages that were not the usual or ordinary result of such an arrest." The case is a difficult one and pre-eminently in its facts is a case for the consideration of the jury.

A large volume of evidence was taken, and many questions of law and practice were raised and determined by the court. The instructions were comprehensive, were clear and apparently fair, and in the main disposed of the many legal questions in the case in a

satisfactory manner. Perhaps a more detailed instruction might have been given upon the question of the responsibility of the defendant for some of the matters complained of, but no further instruction was requested by the defendant which would have been suitable under the circumstances.

The defendant complains that two of the instructions given by the court were inconsistent. In one of these instructions the court said: "When a person in good faith, acting as a reasonable and cautious man under the circumstances, upon information which he has received, believes that property of his own or of another in which he is interested has been stolen, he has a right to inform the police of the fact, and of his belief so formed, and, if in doing so he acts without any malice or sinister motives, he is not responsible for any arrest which may follow made by the police authorities acting upon their own volition, although based in whole or in part upon the information that he may have given such police authorities." It is conceded that this is a proper instruction, but the court also told the jury: "If the plaintiff was innocent of the theft charged against her, she should not have been arrested and detained, as shown by the evidence." This last instruction might have been made more explicit, but we cannot see that it is inconsistent with the other instructions. It will not be denied that, as an abstract proposition, an innocent person should not be arrested, and that statement is not inconsistent with the statement that, although the plaintiff was improperly arrested, the defendant would not be liable for such an arrest under the conditions recited in the former instruction.

The defendant also complains that, in submitting to the jury as to whether the defendant had a reasonable or probable cause to believe that a crime had been committed, the court refused proper instructions tendered by the defendant. It is insisted that, as probable cause is a question of law and fact, the court should have

fully told the jury specifically what facts would constitute probable cause, and the failure to do so, and at the same time refusing instructions requested by the defendant, was prejudicial error. In this connection it is complained that the hypothetical question asked the physician assumed that the plaintiff had undergone a severe mental strain, and the defendant insists that that fact nowhere appears in the record. We cannot agree with the defendant upon that point. If the jury found that the plaintiff, when she was informed of her arrest, fainted and fell to the floor, that fact and others appearing in the record might have justified the jury in deciding that the plaintiff had undergone severe mental strain. The plaintiff objected to riding in the patrol wagon and was not compelled to do so. She walked with the police officer three or four blocks to the police station, and was not confined in a cell, but remained in a waiting room. She was allowed to go home, and was required to return to the police station the next day, which she did, and after an hour or two was allowed to go until called for. It is said in the brief: "Such an experience might, in some persons, cause a great mental strain; in others, it certainly would have no such effect, and the court cannot assume, without any evidence whatever, that the plaintiff belongs to one class or to the other." Of course, it is not a trifling matter to arrest a woman of good character upon a charge of grand larceny and restrain her for hours where criminals congregate. From the evidence above quoted the jury might find that it quite seriously affected the plaintiff.

It is insisted that the fact that the jury upon this evidence returned a verdict for \$10,000 damages is of itself enough to show that the jury generally was ruled by passion and prejudice. The trial court found that the damages were exaggerated by the jury and required the plaintiff to remit one-half of the verdict, and this, it is said, shows that the trial court considered

that the jury acted from prejudice. The task of estimating damages in such a case is a difficult one. There is no exact rule by which damages can be computed. Different minds might come to different conclusions. The theory of the law is that ordinarily a jury is more competent than the court to estimate such damages. When it is clear that the damages allowed by the jury cannot be supported by the evidence, the court will require a remittitur. The fact that a juror errs in his judgment is not such conclusive evidence of prejudice as to admit of no other conclusion.

The brief is a thorough discussion of the case and suggests some other minor points of objection to the judgment, but we think they are not of such a nature as to require an extensive discussion, in view of the unusual length of this opinion. Some of the questions presented are not free from difficulty; but, on the whole, we cannot say that there is any such prejudicial error in this record as to require a reversal, except in the amount of the verdict.

The principal allegations of indignities and ill treatment which the defendant caused the plaintiff to suffer are not supported by the evidence. The jury must have been misled in considering these allegations which led to a verdict for a larger amount than the evidence will warrant. The evidence will not justify a verdict for more than \$3,000.

The judgment of the district court is therefore reversed, unless the plaintiff enter a remittitur for \$2,000 from the judgment. If such remittitur is entered within 30 days, the judgment will be.

AFFIRMED.

WILLIAM E. WALLACE, APPELLANT, v. A. W. COX ET AL.,
APPELLEES.

FILED DECEMBER 19, 1916. No. 18944.

1. **Replevin: JUDGMENT.** Section 7833, Rev. St. 1913, provides that, when the finding is for the defendant in an action of replevin, the judgment shall be "for a return of the property or the value thereof in case a return cannot be had." The "value thereof" is instead of a return of the property when a return cannot be had, and should be the equivalent of the property itself as it was at the time of the trial.
2. ———: **Appeal: BOND: DAMAGES.** If, upon appeal to this court, such judgment is affirmed, and the property is returned to the defendant pursuant to such judgment, in an action upon the appeal bond the plaintiff cannot recover damages occurring prior to the original judgment.

APPEAL from the district court for Webster county:
HARRY S. DUNGAN, JUDGE. *Affirmed.*

L. H. Blackledge, for appellant.

Bernard McNeny, contra.

SEDGWICK, J.

This action is upon a replevin bond. It was once before in this court, and in the first opinion the judgment of the district court was affirmed. 92 Neb. 354. Afterwards, upon rehearing, it was reversed and the cause remanded. 94 Neb. 194. There has since been a trial in the district court and the case is again appealed.

In this last trial the court instructed the jury to find for the plaintiff the amount that the jury in the first trial found as damages, together with the costs of the first trial, and then instructed the jury that the only question for them to determine was whether the property in question was damaged after the trial in the original replevin suit, and the amount of such damage. The plaintiff asked the court to instruct the jury that they should find all damages which "occurred while the property was in the possession of the Clark Imple-

Wallace v. Cox.

ment Company or its agents from the time it was taken in the replevin suit * * * to the time of the offered return" of the property. The court in several different instructions made it plain to the jury that they should not allow any damages to the property in this suit upon the bond, which damages occurred before the trial of the replevin suit. This was upon the theory that the defendants in replevin must upon the trial recover any damages that have occurred to the property up to that time, and this is the principal, if not the only substantial, question that is presented in this record. The statute provides that, when the finding is for the defendant, the judgment shall be "for a return of the property or the value thereof in case a return cannot be had." Rev. St. 1913, sec. 7833. The "value thereof" is instead of a return of the property when a return cannot be had, and should be the equivalent of the property itself as it was at the time of the trial, that is, should be its value at the time of the trial, and, if it has been decreased in value by the action of the plaintiff in replevying it, such loss of value would be damages which should be included in the judgment in favor of the defendant in replevin. The New York court has so decided under a similar statute; that is, the New York court construes the statute to mean that the value thereof which is to be recovered in case the property cannot be returned is the value at the time the property should be returned, that is, at the time the judgment is entered. The contention of the plaintiff in this case now is that he ought to be allowed to prove that as a matter of fact the jury did not take into consideration any damages to the property in their verdict in the original replevin suit.

The trial court on this last trial has followed the decision of this court upon the former appeal, and the judgment is therefore

AFFIRMED.

LETTON, J., dissents.

HAMER, J., dissenting.

I am unable to agree with the majority opinion. William F. Wallace, the defendant in the replevin suit and the plaintiff in this case, testified that there was taken from him a threshing machine. It was a 10-horse Russell engine, separator, blower, feeder, driving belt, water tank—a threshing machine outfit. It was returned to his shed, and he testified that he refused to receive it; also that the property was in bad condition; that the cylinder was pitted where it had been run without oil and burned; that the driving wheels were broken; that the canopy top was torn; that the cylinder guides were all cut; that the axle on the water tank was broken; that the grain pan was warped, and where there was a strip of tin to separate the grain it had come loose, and nails had been driven in the separator along the side; that the driving belt was worn out and the other belts were badly worn; that the engine was not getting enough oil; that the man who was running it said that he tried to pump oil into it, but the cylinders were so worn that it would not take any effect; that they started about 9 or 10 o'clock in the morning to go $2\frac{3}{4}$ miles, and it took until after 2 o'clock in the afternoon to go that distance; that it took a big tank of water and eight tanks besides to run the machine to town; that the property was not worth over \$700; also that he offered to prove that he had had no access to the machine and engine, and that there was no opportunity to examine it from the time it was taken from him until it was offered back; that he did not know its actual condition till that time; that he offered to prove by a witness on the stand that the difference in the value of the outfit in controversy in the replevin suit from the time it was taken from him until it was offered back to him was \$1,200; that between the time when it was taken from him under the replevin proceedings and the time when it was offered back it was kept in the possession of the Clark Implement Company

Wallace v. Cox.

and its agent, Eli H. Cox, and away from him, and without his having any access or means of access to it, or any knowledge or means of knowledge of its condition, and that the actual condition at the time it was tendered back was not known to him, and that the condition at the time of the trial of the replevin suit could not be ascertained by him; that the said Clark Implement Company and its agent, Cox, concealed the fact of the damage and injuries from him, so that he did not know the same. This is the third time this case has been before this court.

The action is one brought upon a replevin bond by the successful defendant in a replevin suit. The machine, when returned, was in so badly a damaged condition as to give the defendant in the case the option of rejecting it and suing for its value on the bond. Upon the trial of the replevin suit the jury found that the defendant (plaintiff herein) was the owner and entitled to the possession of the property, and that, at the time the property was taken under the writ, its value was \$2,000, and that defendant had sustained damages by the wrongful taking and using of said property in the sum of \$404.50, and costs \$121.60. Upon the trial of the action on the replevin bond, there was a verdict and judgment for the plaintiff in that case for \$2,686.33. The judgment was first affirmed (92 Neb. 354) upon condition that plaintiff remit from the judgment the sum of \$404.50. The badly damaged condition of the property controlled the views of the majority. It was said: "Our statute does not provide that the property shall be returned in the same condition as when taken, as in some states, but the holding is practically uniform that such a statute is not necessary, as we have in effect held. Some of the authorities containing these views we here cite, but without quoting from any." The citations are: "*Eickhoff v. Eikenbary*, 52 Neb. 332; *Berry v. Hoeffner*, 56 Me. 170; *Parker v. Simonds*, 8 Met. (Mass.) 205; *Capital Lumbering Co. v. Learned*, 36 Or. 544; *Childs*

Wallace v. Cox.

v. Wilkinson, 15 Tex. Civ. App. 687; *Fair v. Citizens State Bank*, 69 Kan. 353; *Douglass v. Douglass*, 21 Wall. (U. S.) 98; *Pittsburgh Nat. Bank of Commerce v. Hall*, 107 Pa. St. 583; 34 Cyc. 1551, 1552; Cobbey, Replevin (2d ed.) sec. 1182; Wells, Replevin (2d ed.) sec. 422; Shinn, Replevin, sec. 679"—which we have examined.

It was then said that the judgment of the district court would be reversed and the cause remanded, unless the plaintiff within 60 days from the rendition of the order remitted from the judgment \$404.50 as of the date of the judgment: "If such remittitur is filed, the judgment of the district court for the sum of \$2,121.60, with interest at 7 per cent. on \$2,000 from the 19th day of July, 1909, will be affirmed, but at the costs of the appellee."

Judge Sedgwick dissented from the above opinion, and he claimed in his dissent that the plaintiff was not justified in refusing to accept the property when it was returned. He claimed that the petition and the evidence failed to make a case for the plaintiff, because they did not allege or prove that there was any other or different damage than that which the jury allowed in their verdict. He stated that no reason was given for refusing a return of the property: "The evidence and the rulings of the trial court show plainly that the court tried the case upon the incorrect theory that this plaintiff would be justified in refusing to receive a return of the property if he could show that the property was not in the same condition when it was returned as it was when it was replevied, without regard to the fact that he had been allowed \$404.50 because of the change in the condition of the property." Judge Sedgwick's contention was: "If the property replevied is delivered to the plaintiff and the plaintiff has damaged the property in any way while so in his possession, there seems to be no doubt that the defendant may upon the trial of the replevin action recover such damages." Judge Sedgwick's view is clearly apparent

when he says: "If he (plaintiff) fails to return the property at once, and retains it, and the property is damaged in his possession while he retains it after the judgment in replevin, a different question is presented, which is not involved in this case." He was then of the opinion that the judgment of the district court should be reversed. The majority opinion affirmed it.

The case was heard on rehearing before this court, and Judge Rose delivered the majority opinion. 94 Neb. 194. It was said in the third paragraph of the syllabus: "Deterioration in the value of replevied property, while it is unlawfully detained, does not alone justify the owner in refusing to accept it, when returned in due time pursuant to a judgment in replevin, damages to the property after the rendition of such a judgment being recoverable in an action on the replevin bond."

If I understand this aright, it is contended that because the property may be returned it must be received. The condition apparently is that in any event the property must be received, and then if it is not in the same condition that it was when taken there must be another law suit, and this last case must be brought upon the replevin bond. In this case the property in controversy was the threshing machine and a traction engine. In the first opinion Judge Reese calls attention to the damaged condition of the machine. It will be readily understood that an old, worn-out threshing machine would be of very little, if any, value, and a badly damaged traction engine would only be junk. The contention apparently is that the strict letter of the statute must be followed, and that, in any event, when the machine is returned, however badly injured it may be, the party from whom it was taken is bound to accept it. That does not seem to me to be good law or good business.

While the judgment of the district court was affirmed in the opinion delivered by Judge Reese, and it seems to have been held in that case that the damaged condition

of the threshing machine and engine was a good reason why they should not be received when tendered by the plaintiff in that case to the defendant therein, yet by the time the same case was reached on rehearing it was held, Judge Rose delivering the opinion, that the damaged condition of the threshing machine and engine furnished no sort of good reason for not receiving them, and that the defendant in that case was bound to receive the same old threshing machine and engine when tendèred, no difference how much they had been injured since they were taken away from the defendant, and regardless of the circumstances under which they might have been kept out of sight of the defendant, and regardless of the circumstances surrounding the transaction and the trial, and without reference to the defendant knowing their condition, and that the statute contemplated nothing else except that the battered old threshing machine, though only fit for kindling wood, and the burned-out old engine, though only fit for the junk heap as old iron, must be received when offered to the defendant, and at any loss to him. In other words, this theory permits the plaintiff to take away from the defendant his property, to keep and use it up to the end of a long lawsuit, and then, when the plaintiff has lost the case, he may return the property which he has taken away and injured and rendered worthless, and he then is bound to receive it, whether or no, and is without remedy, except by bringing another lawsuit on the replevin bond, which may be attended by all the uncertainties and loss of time and money incident to any other lawsuit.

Section 7833, Rev. St. 1913, refers to sections 7831 and 7832, and says that the judgment in replevin "shall be for a return of the property or the value thereof in case a return cannot be had, or the value of the possession of the same, and for damages for withholding said property and costs of suit." Of course, where the property is very much deteriorated in condition, or

shrunk in value, this section, if it is to be strictly construed, cannot give relief. It should be considered in conjunction with the two sections to which it refers. In section 7831 it is provided that, if the property has been delivered to the plaintiff and judgment be rendered against him on demurrer, or if he otherwise fail to prosecute his action, the court on the application of the defendant shall impanel a jury "to inquire into the right of property and right of possession of the defendant to the property taken. If the jury shall be satisfied that said property was the property of the defendant at the commencement of the action, or if they shall find that the defendant was entitled to the possession only of the same at such time, then, and in either case, they shall assess such damages for the defendant as are right and proper; for which, with costs of suit, the court shall render judgment for the defendant."

Section 7832 provides: "In all cases, when the property has been delivered to the plaintiff, where the jury shall find upon issue joined for the defendant, they shall also find whether the defendant had the right of property or the right of possession only, at the commencement of the suit; and if they find either in his favor, they shall assess such damages as they think right and proper for the defendant; for which, with costs of suit, the court shall render judgment for the defendant."

It will be noticed that each judgment referred to in the sections quoted is a judgment in a replevin suit. Neither of these sections seems to have the replevin bond in mind; yet the law provides for the replevin bond, and these sections are not complete, unless the provision of the Code with reference to the replevin bond is also to be kept in mind. Section 7827, relating to the bond, provides that the sheriff or other officer shall not deliver to the plaintiff the property taken until there has been executed by one or more sureties of the plaintiff

a written undertaking to the defendant in at least *double the value* of the property taken, "to the effect that the plaintiff shall duly prosecute the action and pay all costs and damages which may be awarded against him, and return the property to the defendant, in case judgment for a return of such property is rendered against him." Neither of the sections referred to specifically provides what shall be done in case the property is so damaged when it is returned that it is of little or no value. If a strict interpretation of these sections is to be given, then the defendant, although entitled to the property, is without remedy. In other words, if these sections quoted contain the sum of human knowledge on the subject, the injured defendant is utterly without prospect of relief. This can never have been intended, and no doubt the purpose of the section relating to the replevin bond is that damages may be recovered against the plaintiff in a proper case in which he has injured the defendant.

In *Eickhoff v. Eikenbary*, 52 Neb. 332, it was stated in paragraph 3 of the syllabus: "A plaintiff in replevin against whom judgment has been rendered, must, in order to satisfy the judgment for a return of the property, return or offer to return the identical property replevied and not other property of like kind and value." In *Reavis v. Horner*, 11 Neb. 479, it was held that a party might return a portion of the property, where its value had been separately ascertained, and tender the value of the remaining property. It is said in the body of the opinion in *Eickhoff v. Eikenbary*, *supra*: "There can be no doubt that in order to satisfy a judgment for the return of property the identical property must be tendered, *in substantially the condition in which it was received*." In that case the property in controversy was lumber. After the property was replevied, the plaintiff went on with his business and proceeded to get other lumber. When he got beaten, it was decided that any sort of lumber would not do.

It must be the same old lumber and in the same condition that it was when it was taken.

In *Berry v. Hoefner*, 56 Me. 170, it was held, as stated in the second paragraph of the syllabus: "If goods have been damaged since they were replevied, and while in the possession of the plaintiff in replevin, their mere restoration in a damaged condition will not be a compliance with the bond which requires them to be restored in like good order and condition as when taken."

In Massachusetts, by the statute of 1789 (Laws 1789, ch. 26, sec. 4), the proviso of the writ was: "And also to return and restore the same goods and chattels, in like good order and condition as when taken, in case such shall be the final judgment." Afterwards the statute was amended, and as amended the language was, "to return the said property, in case such shall be the final judgment" (Rev. St. 1836, ch. 113, sec. 19); but no mention was made that the goods and chattels were to be restored in like order and condition. In *Parker v. Simonds*, 8 Met. (Mass.) 205, 210, it was contended that because of this change the plaintiff in replevin was not bound to restore the goods replevied in the same condition as when taken. The court held otherwise.

To hold that in every case the damages found by a jury embrace all damages which defendant may be entitled to will often result in injustice. To illustrate: Certain staple articles having a well-known market value are replevied. They pass from the possession of the defendant to that of the plaintiff, and while in plaintiff's possession are so far removed from the defendant that he has no knowledge of their condition, presumably the plaintiff may be exercising proper care to preserve them. Upon trial of the case, however, it is shown that the articles were the property of the defendant and properly in his possession. Therefore a verdict must be returned in his favor. Suppose

the market value of the articles has depreciated. Defendant knows this fact, and offers proof of it in evidence. He is entitled to the verdict for damages, which shall include the depreciated value. He gets this. Plaintiff then returns the property. It had a value when taken from defendant of \$10,000, so found by the jury. The same articles, because of the depreciation in the market value, are, though in good condition, worth at the time of the trial but \$7,500. Suppose ordinary wear and tear incident to plaintiff's use is \$500. The jury makes the loss good by finding defendant's damage to be \$3,000. However, because of plaintiff's neglect or failure to properly care for the articles returned, they have suffered a loss in value and are worth but \$5,000. Defendant in the replevin suit must accept the goods worth \$5,000. 94 Neb. 194. He has judgment for \$3,000 and the loss of \$2,000 in place of what the plaintiff wrongfully took from him worth \$10,000. If defendant must suffer this, then here is a wrong without a remedy. Defendant is deprived of \$2,000 through a fiction that he has recovered all damages in the replevin suit. Such a theory is a fiction in any case where the defendant has no knowledge that the goods had been injured by more than the ordinary wear and tear. That is this case.

In the case of *Washington Ice Co. v. Webster*, 125 U. S. 426, which was a suit on a replevin bond, Mr. Justice Blatchford used this language: "The principal argument on the part of the defendants in the present suit is that in the statute of Maine (Rev. St. 1857, 1871, ch. 96, sec. 11), which provides that, in a replevin suit, 'if it appears that the defendant is entitled to a return of the goods, he shall have judgment and a writ of return accordingly, with damages for the taking and costs,' the words 'damages for the taking' mean all damages resulting from the taking and detention of the goods; that, if the defendant in replevin recovers judgment for a return of the goods replevied, he may, at his elec-

tion, have the damages which he has sustained by reason of the taking and detention of them, to the time of such judgment, assessed in the replevin suit, or he may recover those damages in a suit on the bond, but cannot have both." Judge Blatchford then said that the contention was "that, as the plaintiff in this suit failed to have such damages assessed in the replevin suit, he cannot recover them in the present suit. This point seems to us, at best, to be altogether technical, and not to be founded on any sound principle." If I understand this, Justice Blatchford condemned the principle for which the majority opinion contends. I think the law is, and ought to be, that, if the facts are known to the plaintiff which relate to the alleged damages, the extraordinary damages must be considered at the time of the trial of the replevin case, and, if such damages are allowed, they should be put into the verdict; but, if there are damages to the property in controversy which occur after the trial, then such damages form a sufficient basis for an action on the replevin bond. The damages awarded in the replevin action should be conclusive of all damages sustained prior to the trial of the replevin suit, unless there has been some sort of concealment or other sufficient cause that has prevented their discovery by the plaintiff. The principle of allowing litigants to get done at some time is recognized in *Reams v. Sinclair*, 97 Neb. 542, wherein, notwithstanding the prior judgment in the ejectment case by reason of plaintiff's failure to show a legal title, he was permitted in the second suit to establish and quiet his title based upon the same defective instrument which had resulted in his defeat in the former action.

In *Ewald v. Boyd*, 24 S. Dak. 16, the horse in controversy died. The judgment was rendered July 10, 1907. On July 13, 1907, the defendant wrote to the plaintiffs, requesting them to come and get the horse. This request reached the plaintiffs on July 29, 1907.

Wallace v. Cox.

One of the plaintiffs went to the defendant's premises, and was told that the horse died about a week before out in the slough in the pasture. The plaintiff was not shown the body of the horse, but he was shown a mound where it was claimed the horse was buried. It was the contention of the defendant that, inasmuch as he had offered to deliver the horse after judgment and before plaintiffs came after it, and the horse had died through no fault of his, it worked a satisfaction of that part of the judgment awarding the plaintiff possession of the horse or its value. The court said: "After the judgment was entered, the defendant retained possession of this horse at his own peril. If he desired to protect himself against the alternative judgment for value of the horse, he was bound to return the horse to plaintiffs. Plaintiffs, if they saw fit, could allow their judgment to stand without issue of execution, desiring that a time would come when defendant would be unable to turn over the horse, and they then be able to collect the alternative judgment which might be more than the horse was worth."

In *Hinkson v. Morrison*, 47 Ia. 167, there was an action brought on defendant's redelivery bond, and defendant attempted to plead as a partial defense the death of one horse. The court said: "We think the defendant's bond cannot be discharged *pro tanto* by showing the mere fact that one of the horses died. By the verdict his detention of the horse was found to be wrongful. His undertaking is absolute to return the property in as good condition as it was when the action was commenced. His obligation is entirely different from that of a bailee rightfully in possession."

In *Lillie v. McMillan*, 52 Ia. 463, the plaintiff took possession of property pending the suit. The jury found for the defendant. One horse and one cow had died. The defendant elected to take the money judgment, and the court held that this was his right, not merely for the property that had died, but for all of it.

In *Capital Lumbering Co. v. Learned*, 36 Or. 544, it was held, as stated in the second paragraph of the syllabus: "Where, in replevin, plaintiff takes possession of the property, and judgment is rendered for its return, and it is of such a character that it can be moved, plaintiff must seek defendant and there tender it to him in the same condition as when received, to avoid liability on his bond."

In *Vallancy v. Hunt*, 26 N. Dak. 611, it was held, as stated in the syllabus: "A party who desires to avoid the penalties of a redelivery bond in replevin must show a delivery or offer of delivery of the property within a reasonable time, in substantially as good condition as when taken, and without material depreciation in value."

In *Moran v. Plankington*, 64 Mo. 337, it was held that the judgment in the first action is only a bar to the second action as far as the plaintiff knew, or ought to have known, of the facts in time to have included the omitted articles in such first action.

In *Schrandt v. Young*, 62 Neb. 254, it is said in the syllabus: "The rule announced in *Romberg v. Hughes*, 18 Neb. 579, that damages for detention may only be had where there is a return of the property, should be restricted to damages for deterioration or depreciation after the taking." In the body of the opinion it was said: "If the property is injured or deteriorates in value after it is taken, a return does not make the defendant whole, because he does not get it in the condition in which it was, and, in order to be fully restored to his former position he ought to have the difference in value as damages. This is universally recognized, and such deterioration is considered a proper element of damage." Commissioner Pound, who prepared this opinion, cited *Hooker v. Hammill*, 7 Neb. 231; Shinn, Replevin, sec. 648.

It would seem that the damages in a replevin suit should be compensation for the interruption of the defendant's possession, the loss of the use of the goods

In re Application of Selicow.

from the time of the taking under the writ of replevin until they are restored, and their deterioration in value within the intervening time. I think that the judgment of the district court is not sustained by the evidence, and that *Teel v. Miles*, 51 Neb. 542, should be overruled or modified. I think that the majority opinion is against a liberal interpretation of the statute, that it is against public policy, and that it is too technical.

IN RE APPLICATION OF MAX SELICOW.

MAX SELICOW, APPELLANT, v. HENRY W. DUNN, APPELLEE.

FILED DECEMBER 19, 1916. No. 19589.

1. **Habeas Corpus: REVIEW.** Proceedings for a writ of habeas corpus are civil in their nature, and, under the present statute, can be brought to this court for review only by appeal. Petition in error is not the proper remedy.
2. ———: **SCOPE OF WRIT.** A writ of habeas corpus is not allowed to correct errors of inferior tribunals.
3. ———: **RIGHT TO DISCHARGE.** If an inferior court has jurisdiction of the proceedings upon complaint of violation of a statute or ordinance, and has not determined the case, the defendant is not entitled to release upon writ of habeas corpus on the ground of alleged invalidity of such statute or ordinance, unless such invalidity appears upon the face of the proceedings.

APPEAL from the district court for Douglas county:
GEORGE A. DAY, JUDGE. *Affirmed.*

J. E. von Dorn, for appellant.

John A. Rine and *W. C. Lambert*, contra.

SEDGWICK, J.

The petitioner was arrested upon a complaint and warrant in the police court of Omaha, charging him with a violation of a regulation of the health commissioner. He applied to the district court for Douglas county for a writ of habeas corpus. A hearing was had

before the court, and upon the record and evidence the court denied the application and remanded the petitioner to the custody of the officer. The petitioner brought his case to this court for review.

1. We first observe that the record is very much incumbered by an attempt to present the case by the petitioner both as an appeal and as upon a petition in error, counsel for petitioner apparently being in doubt as to the proper method of obtaining a review of the case. The petitioner is entitled to have his case reviewed in this court under the constitutional provision, but the practice to be observed in obtaining such a review is regulated by the legislature. Formerly equity cases only could be brought to this court by appeal. All other cases, civil and criminal, were brought here for review by petition in error. This practice obtained without exception until the act of 1907 (Laws 1907, ch. 162). Shortly before the passage of that act, this court had decided that "the judgment of a district court in a proceeding in habeas corpus will not be reviewed by this court on appeal" (*In re Greaser*, 72 Neb. 612), but the act of 1907 provides that all proceedings to obtain a reversal in this court, "except judgments and sentences upon conviction for felonies and misdemeanors under the Criminal Code," shall be by appeal, and under that act it was decided: "Under the provisions of chapter 162, Laws 1907, providing for appeals to the supreme court, only judgments and sentences upon convictions for felonies and misdemeanors under the Criminal Code may be brought to this court by petition in error." *Brandt v. State*, 80 Neb. 843. The prosecution in that case was for a violation of an ordinance of the city of Hastings, and it was held that, even in such case, an appeal is the proper method of obtaining review in this court. Proceedings in habeas corpus have always been considered in this state as civil, and not criminal, in their nature. *In re Van Sciever*, 42 Neb. 772. In that case it was held that the

In re Application of Selicow.

method of obtaining review was by petition in error, but under the practice at that time that rule applied to all cases, civil and criminal, except suits in equity. Again, in *State v. Decker*, 77 Neb. 33, it was decided that "the procedure to obtain a review in this court of a final order made by a district court or judge in a proceeding in habeas corpus must be such as is required to be followed for a like purpose in civil actions," and it was said that sections 483 and 515 of the Criminal Code (Rev. St. 1913, secs. 9124, 9185) "are not applicable to such actions as the present (habeas corpus), and this court is therefore without jurisdiction." Section 375 (Rev. St. 1913, sec. 9269) of the habeas corpus act was not mentioned in that decision, and although that section relates specifically to habeas corpus proceedings, and provides that habeas corpus proceedings "may be reviewed as provided by law in criminal cases," and had been in force for very many years when the statute of 1907 was enacted, and had been recognized and enforced by this court (*Atwood v. Atwater*, 34 Neb. 402), it must now be considered that the legislature in the act of 1907 modified this section as well as others at that time in force, and that now the only method of obtaining a review in this court in habeas corpus proceedings is by appeal.

2. There are 33 assignments of error in the appellant's brief, and among them it is assigned that the court erred in holding that the complaint filed against the petitioner stated an offense against the laws of the state of Nebraska. The complaint was in the police court of the city of Omaha. It alleged that the defendant did "disobey rules of the health commissioner in permitting children under 12 years to enter his show house during epidemic of fever, contrary to the city ordinances of the city of Omaha in such cases made and provided, and against the peace and dignity of the state of Nebraska." The complaint is quite informal, and perhaps lacks some of the necessary allegations in charg-

In re Application of Sellcow.

ing such an offense. Upon this complaint a warrant was issued which was less formal in charging the offense than was the complaint. On this warrant the defendant was arrested and brought before the court. No objection was made in the police court to the complaint or the warrant, so far as this record shows. The defendant immediately applied to the district court for a writ of habeas corpus. The district court appears to have taken a large amount of evidence in regard to the ordinances of the city, and the regulations of the board of health, and other similar matters. The district court should have inquired whether the police court had attained jurisdiction of the defendant, and that would have determined the relator's right to a writ of habeas corpus. "A writ of habeas corpus is not a proceeding to correct errors." *In re Balcom*, 12 Neb. 316. "The writ of habeas corpus is not a corrective remedy, and is never allowed as a substitute for appeal or writ of error." *State v. Crinklaw*, 40 Neb. 759. *In re Langston*, 55 Neb. 310; *Michaelson v. Beemer*, 72 Neb. 761. A person restrained under an unconstitutional law will be discharged on a writ of habeas corpus. *Ex parte Thomason*, 16 Neb. 238. In this last case a preliminary examination was had, and the accused was held to await the action of the grand jury. He failed to give bail, and was remanded to jail, and applied to this court for a writ of habeas corpus. In *In re Application of McMonies*, 75 Neb. 702, it was held: "The writ of habeas corpus will lie to relieve the relator therefor from arrest and detention for the violation of the provisions of a void municipal ordinance." In that case there had been no trial in a court of original jurisdiction. The opinion does not show whether the question of the validity of the ordinance, under which the prisoner was held, had been submitted to and determined by the justice. The ground of the decision is that the validity of the ordinance in question had just been determined by this court, and had been held to be invalid for the reason that the village

State, ex rel. De Bolt, v. Kelly.

board had no power to enact such an ordinance, and it was held that, it being conceded that the ordinance was void, the relator was entitled to his discharge upon a writ of habeas corpus. In the case at bar the validity of the regulation of the board of health and its force and effect depend upon the construction to be given to various statutes of the state, and an ordinance of the city of Omaha. If the proceedings upon which the health officers were acting were void, that fact did not appear upon the face of the complaint or the warrant, and the question of the validity and force of those regulations was a matter of defense before the police magistrate. The errors of that court, if any, could be corrected by a reviewing court, not by proceedings in habeas corpus. It follows that the errors assigned upon the rulings of the district court in receiving and excluding evidence and other similar matters are immaterial here.

The judgment of the district court is right, and is
AFFIRMED.

STATE, EX REL. NORA M. DEBOLT, APPELLANT, v. IDA M.
KELLY, APPELLEE.

FILED DECEMBER 19, 1916. No. 19596.

1. **Insurance: FRATERNAL SOCIETIES: ELECTION OF OFFICERS.** The supreme authority of a fraternal, beneficiary society, which is by the constitution of the order made the "judge of election and qualification of its officers," may at the same meeting, and immediately after an election of an officer is declared, reconsider the election and take another ballot, if the first election is the result of fraud or mistake and irregularity, and generally it is for the voters themselves in such cases to determine the question of fraud or mistake.
2. ———: ———: ———. In such a case, if it appears that the question of fraud or mistake is raised in good faith and is determined by the voters themselves, the courts will not interfere and declare

State, ex rel. De Bolt, v. Kelly.

that the supposed fraud or mistake was not of sufficient importance to justify the action of the voters.

3. ———: ———: ———: RECORDS. If the regular record of the proceedings of such an order is not impeached in the pleadings, nor directly attacked, without objection, in the evidence, the minutes kept by the proper officer and duly certified will control.
4. ———: ———: ———. One who is formally presented as a candidate upon the final ballot, and is voted for without protest on her part, cannot afterwards object that such ballot was without authority, and that she is entitled to the office by the former ballot which was set aside by the action of the qualified voters.

APPEAL from the district court for Douglas county:
WILLIS G. SEARS, JUDGE. *Reversed, with directions.*

John J. Sullivan and Arthur F. Mullen, for appellant.

Jefferis & Tunison, contra.

SEDGWICK, J.

The Supreme Forest, Woodmen Circle, as defined by its constitution, is "a secret, fraternal, beneficiary and benevolent order." Its constitution provides that the regular election of officers "shall take place in 1915 at the biennial meeting of the Supreme Forest and every four years thereafter." One of the officers to be elected was "Supreme Banker," which office had been held by this respondent for several years. The "Supreme Banker" was paid a salary of \$1,500 per annum. A ballot was taken, and the respondent was declared elected. Afterwards some question was raised as to the ballot, and another ballot was taken and the relator declared elected. The respondent refused to surrender the office, and this action was brought. The respondent insists that the first ballot was regular, and that the electors had no power to disregard it and take another ballot. The trial court found for the respondent and dismissed the action, and the relator has appealed.

The constitution of the order contains this provision: "It (the Supreme Forest) shall be the judge of election and qualification of its officers and members and estab-

lish rules for their government." It also contains the provision: "No reconsideration of a ballot shall be had after the guardian has announced the result thereof." These two provisions might be considered as inconsistent, if it were not for the fact that the former is a general provision of the order, and the latter is a special provision in the rules of the order in regard to application for membership, and must, therefore, to avoid inconsistencies, be construed as applying to these matters only. The power of this Supreme Forest to reconsider the election of an officer in the same meeting at which the election was held is very much discussed in the briefs, and it appears to be generally held that, if the election is questioned for some irregularity or mistake in the procedure, and not for the purpose of enabling the electors to change their vote, such a body may reconsider the election, even without a special provision in its constitution making it the judge of the election of its officers. Some authorities have held that such an election cannot be reconsidered for the purpose of enabling the electors to change their votes and elect another person after a qualified person has been elected and accepted the office.

If such an election is the result of fraud or mistake, it may be reconsidered by a majority of those entitled to participate therein, and generally it must be for the voters themselves to determine the question of fraud or mistake. If it is unanimously conceded by those participating in the election that there has been such fraud or mistake as to require another ballot to determine the will of the voters and another ballot is immediately taken accordingly, it is not the duty of the courts to interfere and declare that the supposed fraud or mistake was not of sufficient importance to justify another ballot. If the person afterwards complaining participates in the second ballot without protest and apparently at the time acquiesces in the result, it ought to be conclusive that the fraud or mistake in the first ballot was

State, ex rel. De Bolt, v. Kelly.

sufficient to justify the taking of another ballot, and that the result of the second ballot expressed the real will of the voters.

There is some evidence which by itself would tend to indicate unfair practice in the second ballot and arbitrary action on the part of the presiding officer, in which she was encouraged by some of the electors; but the correctness of the official records of the proceedings is not challenged in the pleadings, and there is no direct attempt in the evidence to amend or modify the official minutes of the proceedings. These minutes recite that two candidates for the office, the relator and the respondent, were nominated. A ballot was taken, and the tellers announced that 63 votes were cast, that the relator received 31 and the respondent received 32 votes. The presiding officer then announced: "Sovereign Kelly receiving the higher number of votes, you have elected your present banker, Ida M. Kelly, to serve as banker for the next four years." The respondent accepted the election, whereupon a delegate announced: "There were only 63 votes cast when there should have been 65." One of the delegates announced that they found a blank ballot, and the presiding officer declared: "If there is anything that concerns the ballots, they should call the attention of the convention to it, so if it is not a legal ballot another ballot may be taken." A delegate inquired whether anyone had a right not to vote, and the presiding officer then announced: "What is the pleasure of the convention? I think the roll should be called and see if there are 65 votes. I will ask that we commence with Sovereign Toomey and count." The record recites that "this count showed that there were 64 present who were entitled to vote." A delegate then announced that she believed that "Mrs. Kelly would wish the ballot correct," and moved that "we reconsider the ballot." The motion was seconded. The question was then raised whether the former ballot was valid, there being one blank ballot, and the presiding officer announ-

State, ex rel. De Bolt, v. Kelly.

ced: "Every one must vote, unless excused by the convention." A delegate then asked, "Can you reconsider a ballot after it has been announced by the Supreme Guardian?" and the Supreme Guardian, as presiding officer, stated: "I would say that the chairman of the tellers did not report the blank until after it was announced. If there is anything wrong, the chairman of that committee should so announce it, so that this convention may say how the ballots were cast. But it was not announced until after I announced the election." The presiding officer then put the motion whether the former ballot should be reconsidered, to be determined by a rising vote. The vote was taken, and it was announced that there were 36 in favor of the ballot being reconsidered, and the motion to reconsider was declared carried. The presiding officer announced: "Now you will prepare your ballot for Supreme Banker. The candidates are Ida M. Kelly and Nora DeBolt, and all must vote." A delegate requested that the candidates be introduced, "so that every one might know which ones they were." That was then done by the presiding officer, who introduced the relator and the respondent, respectively, as the two candidates. The vote was then taken, and the tellers announced that there were 64 votes cast, and that the relator received 33 votes and the respondent received 31 votes, and the presiding officer announced: "You have by your votes elected sovereign Nora DeBolt for Supreme Banker." The respondent then announced: "I want to congratulate Sovereign DeBolt, and assure her that, if she is banker, she will have my hearty co-operation in her work." The relator then formally accepted the office.

It is then established that, immediately after the result of the first ballot was announced, one of the electors raised a question as to the regularity of the election, and a motion was made to take another ballot. This motion was declared adopted and another ballot ordered. It was then declared that there were two candidates,

State, ex rel. De Bolt, v. Kelly.

and this respondent was formally introduced as one of the two candidates to be voted for. By so offering herself as a candidate she again submitted her claims to the voters. She must have done this voluntarily, since there is nothing to the contrary in the record of the election, nor in any evidence offered at the trial. She could not thus avail herself of the chance of a favorable vote, and afterwards repudiate the result. It is not denied that the votes were correctly counted, and that the relator received a majority and was duly declared elected.

The judgment of the district court is reversed and the cause remanded, with instructions to enter a judgment for relator as prayed in the information.

REVERSED.

LETTON, J., not sitting.

FAWCETT, J., dissents.

HAMER, J., dissenting.

This is the case where they had two ballots. On the first ballot Kelly was elected; on the second ballot DeBolt was elected. I do not like this system of double ballots. I am not satisfied that there was any legal right to take the second ballot. It may have been a scheme concocted in the interest of DeBolt. I have seen irregularities in conventions where that sort of thing seemed to be done, and I do not like to be compelled to adopt it in an election in a fraternal insurance society. The voting of one blank ballot ought not to be enough to set aside an election. If not, Kelly has been elected, and she should be allowed to hold the office.

STATE, EX REL. WILLIAM GANTZ ET AL., APPELLANTS, V.
DRAINAGE DISTRICT ET AL., APPELLEES.

FILED DECEMBER 19, 1916. No. 19646.

1. **Statutes: TITLE OF ACT: VALIDITY.** The title of the act (Laws 1911, ch. 145), "An act to amend section fifteen (15), article five (5), chapter eighty-nine (89) of the Compiled Statutes of Nebraska 1909, relating to drainage districts, and to add additional sections to said law, and to repeal said section fifteen (15), as heretofore existing," is broad enough to admit of legislation germane to the subject-matter of the act amended, and not inconsistent with the provisions of that act.
2. ———: ———: ———. The section numbered 44 in this act of 1911 (Rev. St. 1913, sec. 1914) is germane to the original act (Laws 1907, ch. 153), and is not inconsistent with section 20 of the original act, and is not unconstitutional.
3. **Drainage Districts: ORGANIZATION: ELECTIONS.** Under section 1872, Rev. St. 1913, "Any corporation, public, private, or municipal, owning or having an easement in any land or lot, may vote at such election, the same as an individual may." It was not intended to allow double representation of any part of the lands in the district. The easement for which votes may be cast must be of a substantial nature, analogous to ownership. It must include possession under a record right. Landowners cannot be allowed to represent in the election the acres of land lying in a highway which is regularly established.
4. ———: ———: ———. Exclusive possession and a record right of possession and use of the land indefinitely is an easement equivalent to ownership for the purpose of this statute.
5. ———: ———: ———: **RATIFICATION.** If parties who assume to vote for a railroad company or for a county or township are not formally authorized, their acts may afterwards be ratified by the proper authorities. In an action in which the public authorities represented by such agents are not parties, a general allegation that such agents "were not authorized" pleads only a conclusion.
6. **Quo Warranto: SCOPE OF STATUTE.** *Quo warranto* under our statute (Rev. St. 1913, sec. 8328) is intended to prevent the exercise of powers that are not conferred by law, and is not ordinarily available to regulate the manner of exercising those powers.
7. **Drainage Districts: ORGANIZATION: QUO WARRANTO.** If the election held under section 1914, Rev. St. 1913, results in rejecting the prop-
100 Neb.—40

State, ex rel. Gantz, v. Drainage District.

osition to proceed with the work under the plans and details proposed, the directors have no power to proceed further to carry out those plans and details, and *quo warranto* is the proper remedy to test the result of such election.

APPEAL from the district court for Merrick county:
FREDERICK W. BUTTON, JUDGE. *Reversed.*

Elmer E. Ross and Prince & Prince, for appellants.

H. M. Morse and Martin & Boeckes, *contra*.

SEDGWICK, J.

A petition was filed with the board of supervisors of Merrick county for the formation of a drainage district in that county under the provisions of article V, ch. 19, Rev. St. 1913. The board of supervisors having acted upon the petition as the statute contemplates, an election was called, which resulted in favor of the formation of the district and the election of a board of directors, who duly qualified. The board of directors then caused plans and specifications to be made for the construction of the drainage ditches, and estimated that the cost thereof would be \$16,698. Thereupon an election was called under section 1914, Rev. St. 1913, to determine the question of proceeding with the work and incurring the necessary expense thereof. The election was held, and it was declared by the canvassing board that the result of the election was in favor of proceeding with the proposed plan of drainage. Whereupon this action in *quo warranto* was brought in the district court for Merrick county against the drainage district and the directors thereof to require the directors to answer "by what authority or warrant they claim to proceed further in the premises in the prosecution of said enterprise," and for a judgment that the election so held "resulted in the defeat of said proposition." The prayer of the petition continued: "And that it be further adjudged by the court that the said board of directors have no further authority to proceed except to certify a tax levy

to pay the necessary expenses incurred up to and including said election." The defendants filed a general demurrer to the petition, which was sustained, and the action dismissed, and the relator has appealed. It is contended that *quo warranto* is not the proper remedy in such case, and that section 1914 is unconstitutional and void.

1. The petition, after relating the facts above recited, alleges that the canvassing board of the election found that the total number of the votes cast was 9,132, and that 4,703 votes were in favor of proceeding with the proposed plan of drainage, and 4,429 votes were against so proceeding, and declared that the majority in favor of proceeding was 274. It was further alleged that 349 votes were cast in favor of the proposition as representing the number of acres of land in the right of way of the Union Pacific Railroad Company, that those votes were cast by the station agent at Clarks, and that he was not authorized to act for the railroad company in the premises, and that the total number of acres in the right of way of the railroad company, within said district, was not more than 150 acres, and that "all parties voting in favor of said proposition and having lands through which the right of way of said railroad company extended within said district, such party, or parties, voted the entire tract, or government subdivision, of land, and counted the acreage of the said right of way as the part of said subdivision, all of which they claimed to own, and cast such number of votes therefor as included the land therein owned by them and the said right of way; that approximately 100 votes were thus cast by said landowners in excess of the land actually owned by them, or in which they had any right, title, or interest entitling them to cast any vote or votes therefor, and were counted and included in the return favorable to said proposition." It it also alleged that 280 votes were cast in behalf of Merrick county as representing the number of acres of

State, ex rel. Gantz, v. Drainage District.

land claimed to be within the highways in said district and used for road purposes; that the party who cast such votes was not authorized, and that the "owners of the real estate in said district voted the full number of acres of land by them respectively held without any deductions for road purposes as they were of right authorized to do, and that the total number of acres in said district used for road purposes and not voted by the owners did not exceed 50 acres."

If these allegations were true, there was no majority of legal votes in favor of the proposition, and the proposition was not adopted by the voters. The statute provides: "Any corporation, public, private, or municipal, owning or having an easement in any land or lot, may vote at such election, the same as an individual may." Rev. St. 1913, sec. 1872. The legislature took notice of the fact that the public highways and the right of way of transportation companies would be benefited by drainage. It was intended to make them responsible for their proportion of the expense of the improvement (Rev. St. 1913, sec. 1830), and to allow them a share with the individual landowners in such control as was given to interested parties. This purpose and the nature of these public interests affected must be considered in ascertaining the meaning of the language used by the legislature: "Any person may cast one vote on each proposition to be voted on for each acre of land or fraction thereof and for each platted lot which he may own or have an easement in, as shown by the official records of the county where the land or lots may be." Rev. St. 1913, sec. 1872. It was not intended by the use of the words "which he may own or have an easement in" to allow double representation of a part of the lands in the district. The ownership must be complete; that is, there must be title and the right of possession. The easement must be of the substantial nature of a railroad company's easement in its right of way, or of the public in the highways; that

is, it must include possession under a record right. Therefore landowners could not be allowed to represent in the election the acres of land lying in a highway which is regularly established, or in the right of way of the railroad company. While the public, or railroad company, does not have absolute title to such lands, it has exclusive possession, and has the record right to possession and use thereof indefinitely. This is an easement equivalent to ownership for the purposes of this statute.

The allegations that the "station agent at Clarks" was not authorized to cast the votes of the railroad company and that "the party who cast such votes" for the county were "not authorized" are not sufficiently pleaded to amount to more than conclusions of the pleader. If these parties were not formally authorized, their acts might afterwards be ratified, and there is no allegation that this was not done.

The drainage act under which these proceedings were had was enacted in 1907. Laws 1907, ch. 153. Section 1914, Rev. St. 1913, is a part of the act of 1911. Laws 1911, ch. 145. These two acts are incorporated in Rev. St. 1913, ch. 19, art. V, being sections 1866-1914. It is contended that section 1914 is unconstitutional, as it violates section 11, art. III, Const., which provides: "No bill shall contain more than one subject, and the same shall be clearly expressed in its title. And no law shall be amended unless the new act contains the section or sections so amended, and the section or sections so amended shall be repealed." The act of 1907 has a very comprehensive title: "An act to provide for drainage districts to drain wet land, * * * and the rights, obligations and powers of such corporations, * * * and defining the duties and powers of public officials." The amendatory act of 1911 is entitled "An act to amend section fifteen (15), article five (5), chapter eighty-nine (89), of the Compiled Statutes of Nebraska 1909 relating to drainage districts, and to add ad-

State, ex rel. Gantz, v. Drainage District.

ditional sections to said law, and to repeal said section fifteen (15), as heretofore existing." Under this title any sections might be added that were germane to the original title of the act. After amending section 15 and repealing the same, the act of 1911 adds several additional sections. One of these additional sections, which is numbered 44, provides: "In all districts hereafter organized the board of directors, having first adopted detailed plans and specifications of the work proposed to be done, and made an estimate of the total cost of such contemplated improvement, and filed said plans, specifications and estimated cost with the county clerk of the county having the largest area of land, shall then publish a notice once each week for three weeks in a newspaper in each county, of an election to vote on the question of proceeding with such work and incurring of the necessary liability, which election shall be held in all respects as other elections, provided for in this article." Section 20 of the original act of 1907 is a definition of the duties of the directors after the district has been regularly organized. It begins with the provision: "Said board of directors shall employ such engineer, surveyor and other help as they may deem necessary and proper and shall proceed according to their best judgment to carry out such work of the character mentioned in paragraph one hereof, as they deem for the public health, convenience and welfare." It is contended that this authorizes the board of directors to proceed with the work in accordance with the plans, specifications and details that they made out, and that as section 1914 limits the discretion of the board and requires that, after the plans and specifications and the details of the improvements are decided upon, the board cannot proceed to incur this expense without the consent of the taxpayers interested, it amounts to an amendment of section 20 of the original act, and, as it does not repeal that section, is a violation of the provision of the Constitution above quoted.

Section 20 of the original act of 1907 will not bear this construction. It appears from a reading of the whole section that it was not intended to provide at what point in the proceedings the board should contract for construction and repair, but to provide how the board should act in making such contracts and proceeding with the work. Section 1914 is a very important provision. If, after the district is organized, it develops that the expense of the drainage would be so great and the difficulties connected with it so important as to render the whole scheme unadvisable, the authority to determine that question is very important and should rest with the owners of the property upon whom these burdens would fall. This provision is not necessarily inconsistent with the section of the original act defining the duties of the directors, and should not for that reason be held unconstitutional.

2. The statute provides: "An information may be filed against any person unlawfully holding or exercising any public office or franchise within this state, or any office in any corporation created by the laws of this state, or when any public officer has done or suffered any act which works a forfeiture of his office, or when any persons act as a corporation within this state without being authorized by law, or if, being incorporated, they do or omit acts which amount to a surrender or forfeiture of their rights and privileges as a corporation, or when they exercise powers not conferred by law." Rev. St. 1913, sec. 8328.

It is said in *State v. Scott*, 70 Neb. 684: "Since the remedy by information in the nature of *quo warranto* is employed to test the actual right to an office or franchise, it seems that it cannot be extended to relieve against official misconduct which does not work a forfeiture of the office." It is contended that this is decisive of the case at bar. It is true that *quo warranto* under our statute is intended to prevent the exercise of powers that are not conferred by law, and is not ordi-

State v. Supreme Forest, Woodmen Circle.

narily available to regulate the manner of exercising those powers. It is also manifest that, if the work is to be proceeded with, the directors are the proper officers to exercise such powers. Section 1914, Rev. St. 1913, provides: "If a majority of the votes at such election vote against proceeding and incurring the liability, then the board shall abandon the same, and shall thereupon certify to the county clerks a tax levy on all the tracts in the district by valuation, sufficient to pay all the liabilities of said district, and said levy shall be entered and collected as other general taxes, and used to pay said liabilities." If the allegations of this complaint are true, a majority of the votes were against proceeding further and incurring further liability. It was then the duty of the board of directors to abandon the project, and they were without power to proceed with the project and incur further expense. They were attempting then to exercise powers which they did not possess under the law, and an information in *quo warranto* was the proper remedy under the statute.

We conclude that the court erred in dismissing the action without investigation, and the judgment is reversed and the cause remanded for further proceedings.

REVERSED.

STATE OF NEBRASKA, PLAINTIFF, v. SUPREME FOREST,
WOODMEN CIRCLE, ET AL., DEFENDANTS.

FILED DECEMBER 19, 1916. No. 19761.

1. **Insurance: FRATERNAL ASSOCIATIONS: STATE CONTROL.** The authorities of the state, under our statute, are given such control of fraternal beneficiary associations as to require the state to see that the interests of the members of the association are not sacrificed by unauthorized usurpations of authority on the part of officers of the association. Under the circumstances in this case, this court has original jurisdiction of an action in the name of the

State v. Supreme Forest, Woodmen Circle.

state brought by the attorney general, in behalf of the insurance board, to determine the jurisdiction and powers of the contending officers of the association.

2. ———: ———: FORM OF GOVERNMENT. A fraternal beneficiary association must, under our statute, have a representative form of government, that is, the governing powers of the association shall be elected directly or indirectly by the members. The governing body in the defendant association, called the "Supreme Forest," is so elected, and corresponds to the board of directors in an ordinary corporation. It is authorized to "enact laws for its own government and for conducting the business of the order generally." Laws so enacted in harmony with the constitution of the association and statutes of the state are binding upon the association and its officers and members.
3. ———: ———: ———. The constitution of the order creates an executive council which is subordinate to the Supreme Forest. The council could not authorize a committee to conduct "the business of the order generally" without the approval of a specified number of the members of the Supreme Forest, and its attempt to do so is held invalid.
4. ———: ———: CONSTITUTION: CONSTRUCTION. When the language of the controlling writing is at some point ambiguous, the practical construction by the parties themselves must control.

ORIGINAL PROCEEDING by the State against the Supreme Forest, Woodman Circle, and others. Application for injunction. *Injunction allowed.*

Willis E. Reed, Attorney General, for plaintiff.

John J. Sullivan, Arthur F. Mullen, Stout, Rose & Wells, Brogan & Raymond, Jefferis & Tunison and Frank H. Gaines, contra.

SEDGWICK, J.

The Supreme Forest, Woodmen Circle, is a fraternal beneficiary association with a large membership throughout the United States. The legislative body of the order is known as the "Supreme Forest," and the constitution provides that it shall have original and appellate jurisdiction in all matters pertaining to the general welfare of the order. The constitution also provides for a supreme executive council, and this council is given

State v. Supreme Forest, Woodmen Circle.

all power and authority of the Supreme Forest when that body is not in session, except as specified in section 30 of the constitution. The chief officer of the Supreme Forest is called the supreme guardian, and the constitution provides that the supreme guardian shall also be a member of the supreme executive council. The Supreme Forest meets biennially, and at its last meeting elected the defendant Emma B. Manchester supreme guardian. She assumes, and now insists, that under the constitution she has the power and duty to "administer the organization or field work of the society." This appears to include the appointment of financial and other agents and attorneys, and other important matters. The supreme executive council appointed a committee of three, of which Mrs. Manchester was one, to take charge of and control this "organization or field work." The defendants Dora Alexander and Mary E. LaRocca, the other two members of the committee, being a majority thereof, assumed to direct the "organization or field work," and so a conflict arose between Mrs. Manchester and these two members of the committee, and it seems to be conceded that this conflict so disorganized the business as to endanger the existence of the association. The attorney general, in behalf of the insurance board of the state, brought this action in *quo warranto* in this court to determine the jurisdiction and powers of these respective authorities, making the association and these three officers, the members of the supreme executive council, and the members of the board of supreme managers, defendants. No brief has been filed on behalf of the state. Mrs. Manchester, as supreme guardian, by her attorneys, represents one side of the controversy, and also briefs have been filed on behalf of the other defendants as representing the other side of the controversy.

1. It is suggested that the court should not entertain jurisdiction of the action because the state is not interested in the controversy, and therefore the insurance

State v. Supreme Forest, Woodmen Circle.

board and the attorney general cannot maintain such proceedings. This question is not much discussed in the briefs, and, without entering into a discussion of the matter, we have concluded that the authorities of the state, under our statute, are given such control of these beneficiary associations as to require the state to see that the interests of the members of the association are not sacrificed by unauthorized usurpations of authority on the part of the officers of the association.

2. There is more or less ambiguity and uncertainty in the articles of association and the by-laws, and, even if we assume that all parties have acted in good faith, it is apparent that these uncertainties have led to this destructive conflict of authority. The constitution provides that the supreme guardian shall appoint deputy supreme guardians and instruct them in their duties. The contending parties do not agree as to the powers and duties of these deputy supreme guardians so appointed. If under the constitution and the laws of the association the supreme guardian and these deputy supreme guardians are "to administer organization or field work of the society," then the contention of Mrs. Manchester as supreme guardian must be sustained; but if the authority of the supreme guardian and the deputy supreme guardians is limited to the more formal duties of the supreme guardian, and does not include the "organization or field work," then the contention of Mrs. Alexander and Mrs. LaRocca, as a majority of the committee appointed by the executive council, must be sustained.

The statute provides that such association shall have a representative form of government, that is, the governing powers of the association shall be elected directly or indirectly by the members, and it appears from its constitution that the Supreme Forest is so elected, and is the governing power of the association. The Supreme Forest is the governing body, and corresponds to the board of directors in an ordinary corporation. The executive council is a subordinate body with limited pre-

State v. Supreme Forest, Woodmen Circle.

scribed powers and duties, and cannot be considered in any sense as analogous to the controlling directors of a corporation. The Supreme Forest "shall enact laws for its own government and for conducting the business of the order generally." The regulation of the general business of the order, then, is to be by legislation, and the executive council can legislate only as provided in the constitution. Manifestly the executive council can have no power that shall conflict with the laws so enacted by the Supreme Forest. By the constitution it is provided that the supreme executive council shall have a limited legislative power. In order to exercise such power, it must be determined by unanimous vote of all the members present that an emergency exists, and no legislation shall be enacted unless the same shall receive the affirmative vote of at least seven members of the council, and no legislation of theirs shall be enforced until it is approved in writing by two-thirds of the members of the Supreme Forest other than members of the supreme executive council. In the appointment of this committee the executive council did not comply with these requirements. The council therefore could not clothe this committee with authority to "conduct the business of the order generally." That power is in the Supreme Forest, and must be exercised by enacting laws; that is, by legislation. The executive council can legislate only in the specific manner stated in the constitution. It follows that the committee could not take control of the general business of the order.

A deputy is "one authorized by an officer to exercise the office or right which the officer possesses for and in place of the latter." This brings us back to the question we begin with: Is the supreme guardian authorized to organize groves, or local branches of the order, and to generally administer the "organization or field work?" If so, she might appoint deputy supreme guardians to perform these duties. It is her duty to preside at all meetings of the Supreme Forest and of the supreme ex-

State v. Supreme Forest, Woodmen Circle.

ecutive council and enforce the laws of the order. "She shall appoint all committees not otherwise provided for, and have general supervision over the affairs of the order."

There is no express or definite provision in the constitution and laws of the association as to who "shall generally administer the organization or field work." The most that can be said in favor of the contention that the executive council has this power and duty is that the language of the constitution and laws is ambiguous upon that point. Under such circumstances, the practical construction by the parties themselves must control. For many years the supreme guardian has performed these duties, and all parties have acquiesced in this construction of the constitution and laws without question.

We conclude that, until the Supreme Forest takes action, this construction must control. There will be a meeting of the Supreme Forest soon, and it is to be hoped that such definite and unequivocal action will be taken as to avoid such conditions in the future. In the meantime the supreme council and the committee, of which the defendants Dora Alexander and Mary E. La-Rocca are members, are enjoined from interfering with Emma B. Manchester, the supreme guardian, and her deputies regularly appointed in organizing groves, or local branches of the order, and generally administering the organization or field work of the association.

INJUNCTION ALLOWED.

ROSE, J., not sitting.

FAWCETT, J., dissenting.

The resolution of the executive council, which is the crux of this case, was not legislation, but simply a declaration by the executive council of the manner in which the business affairs of the corporation, over which the executive council had general control, should thereafter be managed. It seems to me to be a strained construction of the action of the Supreme Forest, or of the purpose of the elected delegates and other members of

State v. Supreme Forest, Woodmen Circle.

the Supreme Forest in taking such action, to say that the Supreme Forest, by article VI of its amended and substituted articles of incorporation, adopted May 22, 1907, would enact that "the supreme executive council shall have the general control and management of the business affairs of this corporation except during the session of the Supreme Forest," unless the Supreme Forest intended to place in the hands and under the general control of the supreme executive council the management of all the business affairs of the corporation. That the Supreme Forest intended that the supreme executive council should have all the power of the Supreme Forest itself in the general control and management of the business affairs of the corporation is shown by the closing words, "except during the session of the Supreme Forest." It seems to me that it logically follows that the Supreme Forest, which, when in session, has undoubted exclusive, general control and management of the business of the corporation, realized that when the Supreme Forest was not in session there should be some body, composed of more than one person, which should be invested with the powers possessed by the Supreme Forest when in session. To "control" means: "To exercise control over; hold in restraint or check; subject to authority; direct; regulate; govern; dominate: To have superior force or authority over; overpower." To "manage" means: "To control or direct by administrative ability; regulate or administer; have the guidance or direction of: To control, restrain, or lead by keeping in a desired state or condition: * * * To arrange, fashion, contrive, effect, or carry out by skill or art; carry on or along; bring about." Century Dictionary. The Supreme Forest was undoubtedly made up of educated and intelligent delegates, convened to represent a great organization. They must be presumed to have meant just what the language which they employed imports. It thereby wisely gave to the supreme executive council general control and management of all the busi-

State v. Supreme Forest, Woodmen Circle.

ness affairs of the corporation at all times except during the sessions of the Supreme Forest itself. It seems to me that it cannot be doubted that, in giving the supreme executive council general control and management of all the business affairs of the corporation, it thereby made the supreme executive council supreme in the control and management of the business affairs of the corporation, which included the general control and direction of all of the officers and representatives of the corporation through whom the business affairs of the corporation are managed, which would, clearly, include the supreme guardian. Any other construction would be to hold that the Supreme Forest intended to give to the supreme guardian sole and exclusive control of all the important business of the corporation, involving the appointment of field agents, the most important membership producing branch of the business of the corporation, and the arbitrary fixing of their compensation, involving the expenditure of thousands upon thousands of dollars of the corporation's money, and leave this individual official of the corporation in the control and management of substantially all the business affairs of the corporation, independent of and free from the supervision and direction of the supreme executive council, to which council the Supreme Forest gave the general control and management of the business affairs of the corporation, except during the session of the Supreme Forest itself. Clearly, it intended that during the intervals between sessions of the Supreme Forest the supreme executive council should be supreme in its general control and management of every branch of the business affairs of the corporation. The resolution adopted by the supreme executive council was a mere order in the course of the management of the business affairs of the corporation, and not a matter of legislation. It did not create an emergency requiring the unanimous vote of all members of the council present or the submission to referendum vote of the members of the Supreme Forest. Hence, it is immaterial that

State v. Supreme Forest, Woodmen Circle.

one member of the supreme executive council protested that the resolution was in conflict with the laws of the order, and refused to participate in the adoption of the same. If it was simply an act or order in the course of the management of the business affairs of the corporation, and not legislation, the order could be made by the vote of a majority of the supreme executive council, and would be binding upon every official of the corporation charged with the performance of any part of the business affairs of the corporation. In other words, I hold that the supreme executive council, as to the general control and management of all the business affairs of the corporation, is, when the Supreme Forest is not in session, supreme and absolute; and, if any officer or agent of the corporation refuses to obey the directions of the supreme executive council, she or he immediately becomes subject to removal by such council.

The fact that the Supreme Forest created certain offices, including that of supreme guardian, and defined their duties, cannot be construed as a grant to such officers of powers in the management of the business affairs of the corporation, independent of and superior to the supreme executive council, to which, its very name and the language employed clearly show, the Supreme Forest intended to give all the powers in the control and management of the business of the corporation, during its vacation, which it had itself when in session.

The fact that the supreme executive council had, prior to the time now complained of, never deemed it necessary to give directions to the supreme guardian, cannot be construed to mean that it had at all times prior thereto recognized or acknowledged the supreme guardian as being independent of, and not subject to, the direction and control of the supreme executive council.

In view of what I have said, my judgment is that the restraining order granted herein should be discharged and relator's petition dismissed.

HENRY COOK, APPELLEE, v. NATIONAL FIDELITY & CASUALTY COMPANY, APPELLANT.

FILED DECEMBER 19, 1916. No. 18875.

1. **Insurance: POLICY: CONSTRUCTION.** In an action brought upon an insurance policy, where there was a condition to the effect that the defendant insured Henry Cook against loss of life, limb, sight and time in the minimum principal sum of \$5,000, and for a minimum weekly indemnity of \$25 for 12 months on account of accident, and 12 months, excluding disability due to any disease or illness contracted or suffered within 15 days of the date of the policy, on account of sickness, and the policy also contained a clause touching beneficiary insurance to apply to one person only over 18 and under 60 years of age other than the assured, it will be held that the clause may cover the person named in the policy as such beneficiary, even after the expiration of the age limitation of 60 years.
2. ———: ———: ———. In such case, where an accident occurs to the person named in the policy as the beneficiary, and it occurs after such person is beyond the age of 60 years, and after a renewal of the policy without mention of the beneficiary, the defendant insurance company will be held liable upon the beneficiary clause on the ground that there is a waiver by the defendant of the protection which it might claim.

APPEAL from the district court for Webster county:
HARRY S. DUNGAN, JUDGE. *Affirmed.*

Nye F. Morehouse and L. H. Blackledge, for appellant.

Bernard McNeny and J. S. Gilham, contra.

HAMER, J.

Appeal from Webster county. This is an action on an insurance policy. Arabella Cook, the wife of plaintiff, was fatally burned in a fire which occurred in her home at Red Cloud, Nebraska, on May 22, 1913. Suit was brought on the policy issued by the defendant and appellant, and a verdict and judgment were rendered against it, from which it has appealed.

The questions raised involve a construction of the contract contained in the policy. We deem the following

Cook v. National Fidelity & Casualty Co.

provisions of the policy essential to an understanding of the questions presented: "National Fidelity & Casualty Company, Omaha, Nebraska, Home Office Merchants National Bank Building, hereby insures Henry Cook, M. D. (the person herein named and described in the schedule of warranties for the insurance) against loss of life, limb, sight and time in the minimum principal sum of five thousand dollars and for a minimum weekly indemnity of twenty-five dollars, under the terms and agreements hereinafter set forth, for twelve months on account of accident, and twelve months, excluding disability due to any disease or illness contracted or suffered within fifteen days after date of this policy, on account of sickness, as hereinafter described, from the 27th day of June, 1910, at twelve o'clock noon, standard time, at the place where this policy is countersigned. This policy is issued in consideration of the premium of forty dollars, and of the statements contained in the schedule of warranties hereinafter given, which statements the assured makes by accepting this policy and warrants to be true."

Then follow stipulations of the policy as to the kind and amount of insurance, and also paragraph L, which is the foundation of plaintiff's case: "L. Beneficiary Insurance. If one person only, over eighteen and under sixty years of age, other than the assured, is specifically named as beneficiary in the schedule of warranties hereinafter given, then and not otherwise, this policy shall also, in consideration of the premium, insure the person so named as beneficiary, subject to the general agreements hereinafter given, against disability or death caused directly in the manner set forth in clause B, as follows:" Here follow stipulations of the policy touching the amount and kind of insurance.

Clause B, referred to, is as follows: "B. Double Indemnity. If said bodily injuries are sustained by the assured while riding as a passenger in or on a public conveyance, provided by a common carrier for passenger

Cook v. National Fidelity & Casualty Co.

service; or while riding as a passenger in a passenger elevator (excluding elevators in mines); or while in a burning building, the amounts otherwise payable in clause A shall be doubled."

The "schedule of warranties" shows that Mrs. Cook, named as beneficiary, was 59 years of age at the time the policy was issued, while her husband was 61 years of age. She was 61 years and 10 months old at the time of the accident which resulted in her death. The policy having been renewed each year, the question is whether she was to be considered as included in the policy at the time of her death. By the specific terms of the contract it appears that insurance on the beneficiary is limited. The beneficiary is not to be under 18 years of age nor over 60.

(a) If the defendant meant that the policy should terminate on the arrival of the sixtieth birthday of the beneficiary, it should have said so plainly. It did not say so; therefore it is fair to assume that it did not claim when the policy was issued what it now contends for. If it did so claim, then its purpose would have been to deceive, and this we cannot presume.

(b) If it was intended that the terms of the policy should not include the beneficiary in case of renewal, then that statement should have been made. It was not made, and the general terms of the language used are suggestive of the fact that the beneficiary is to be included. There should be no deception of the public by the use of a printed form which is disregarded by the parties in their interpretation of the contract. When the renewal was made and nothing was said about its effect so far as the beneficiary was concerned, then there was a waiver of anything upon the part of the defendant that might be claimed in the policy and which was inconsistent with the fact of renewal.

(c) Every policy written should continue for the full term of its face, except there is some condition by which the company is to be released from the obligation which

it has assumed. If there is a renewal, and it is not intended that the renewal shall apply to the beneficiary, then the fact should be noted, so that the assured may be apprised of the purpose of the insurance company.

(d) That interpretation of the contract should be adopted which upholds the obligation which the parties apparently contracted for. 9 Cyc. 586.

(e) That construction should be put upon the contract which the defendant had a right to expect the plaintiff would reasonably adopt under the circumstances. 1 Chitty, Contracts (11th Am. ed.) 104; *Hoffman & Place v. Aetna Fire Ins. Co.*, 32 N. Y. 405; *Beber v. Brotherhood of Railroad Trainmen*, 75 Neb. 183.

In 1 Chitty, Contracts, *supra*, it is said the contract "must, therefore, be the sense (for there is no other remaining) in which the promisor believed that the promisee accepted the promise."

In *Hoffman & Place v. Aetna Fire Ins. Co.*, *supra*, it is said in the syllabus: "Where the language of a promisor may be understood in more senses than one, it is to be interpreted in the sense in which he had reason to suppose it was understood by the promisee."

"Conditions and provisos in policies of insurance are to be construed strictly against the underwriters, as they tend to narrow the range and limit the force of the principal obligation."

In *Beber v. Brotherhood of Railroad Trainmen*, *supra*, it was said: "If the officers of the society, who prepared the by-law in which the contract is set forth, have used ambiguous terms, the ambiguities must be interpreted in the manner most favorable to the insured. If instead of stating in plain and simple language the exact loss they intend to protect against, they propound riddles in a jargon of equivocal phrases, these riddles should be solved most favorably to him who has been the victim of such artifice."

The assured had a right to rely upon the validity of the renewals. *Owens v. Travelers Ins. Co.*, 99 Neb. 560.

Where there are conflicting provisions in the policy, the courts will adopt that which is most favorable to the assured, and which offers a fair interpretation. *Funke Estate v. Law Union & Crown Ins. Co.*, 97 Neb. 412.

It would seem that the defendant resists payment on grounds that are rather technical. The beneficiary, Mrs. Cook, was burned to death on the 22d of May, 1913. The policy was then in force. She and her daughter were laboring to extinguish the flames in the kitchen of their frame dwelling-house. These flames were occasioned by the spilling of alcohol from a kettle on the stove. From the fire thus created, flames were communicated to the woodwork, and her clothing caught fire. She was most severely burned. On the day after she suffered the injury she died. The policy issued showed that the age of Dr. Cook at the time the contract was made was 61, and Mrs. Cook, the beneficiary, was 59 years of age. The contract was renewed for three successive years by payments of the annual premiums, which were paid in advance.

The interpretation which the parties to a contract put upon it should determine their rights under it. *Sibert v. Hostick*, 91 Neb. 255.

The renewals of the policy clearly recognize the fact that Mrs. Cook was over 60 years of age.

The following phrases are to be interpreted: "Under the terms and agreements hereinafter set forth." Third line of policy. "If one person only, over eighteen and under sixty years of age, * * * is specifically named as beneficiary, * * * this policy shall * * * insure the person so named * * * subject to the general agreements hereinafter given." Paragraph L. "Nor does this policy cover or apply to any person (either as assured or beneficiary) under eighteen or over sixty years of age." Agreement 4.

As we understand it, there is no distinction as to the age limit between the assured and the beneficiary. We

think the language used means that a policy may be written for any one over 18 and under 60 at the time of the issuance of the policy, but that no policy shall be written for any one outside of those ages at the date of the policy. 6 R. C. L. 847. In section 237, 6 R. C. L. 847, it is said: "It is a well-settled rule of law that where part of a contract is written and part is printed, and the written and printed parts are apparently inconsistent or there is reasonable doubt as to the sense and meaning of the whole, the words in writing will control the construction of the contract. The reason why greater effect is given to the written than to the printed part of a contract if they are inconsistent is that the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning, while the printed form is intended for general use without reference to particular objects and aims." Many authorities are cited in support of this proposition. Applying the principle, of course not the actual fact, to the instant case, the last thing done, that is, the renewal of the policy, shows what the parties meant. It never was meant there should be no power to renew.

We think it contrary to public policy to permit an insurance company to so conduct itself that the assured has good reason to believe that the policy is in force, both as to himself and the beneficiary, and then avoid the contract of insurance by a forced interpretation of the policy not in accord with the conduct of the parties. It is not right that the company should lead the assured and his beneficiary to believe that the policy is in force and then try to avoid the terms of the contract. The company should not collect premiums without a valid consideration. If there is no insurance, no premium should be paid. No technical construction of uncertain language should be allowed to defeat the assured and

Crinkley v. Rogers.

prevent him from getting that to which he is justly entitled.

The judgment of the district court is

AFFIRMED.

ROSE, J., concurring in the conclusion.

MORRISSEY, C. J., and SEDGWICK, J., not sitting.

JOHN J. CRINKLEY ET AL., APPELLEES, v. JOHN T. ROGERS
ET AL., APPELLANTS.

FILED DECEMBER 19, 1916. No. 19059.

1. **Devise: AGREEMENT TO MAKE.** An agreement upon sufficient consideration to devise or bequeath property is valid and enforceable." *Teske v. Dittberner*, 70 Neb. 544.
2. ———: ———: **CREATION OF TRUST.** "In such case, equity will impress a trust upon the property, which will follow it into the hands of personal representatives of the promisor or grantees without consideration." *Teske v. Dittberner*, 70 Neb. 544.
3. **Trusts: CREATION.** "Where a person, knowing that a testator with whom he has confidential relations in leaving him a devise or bequest intends it to be applied for the benefit of another, either expressly promises or by his action at the time implies that he will carry the testator's intention into effect, and the property is left to him with the faith on the part of the testator that his promises will be kept, he will be held as trustee." *Smullin v. Wharton*, 73 Neb. 667.
4. ———: ———: **EQUITY.** "In such case, the will has full effect by passing an absolute legacy to the legatee, but equity, in order to defeat fraud, raises a trust in favor of those intended to be benefited by the testator, and compels the legatee as a trustee *ex maleficio* to turn over the gift to them. The court acts not upon an express trust created by the testator but, on account of the fraud, upon the conscience of the devisee" *Smullin v. Wharton*, 73 Neb. 667.
5. **Evidence** examined, and found sufficient to sustain the decree of the trial court.
6. **Witnesses: COMPETENCY.** Testimony of witnesses having a direct legal interest in the subject of the controversy, and of the attorney and confidential adviser of the deceased, held properly excluded. See sections 7894, 7898, Rev. St. 1913.

Crinkley v. Rogers.

7. **Appeal: EVIDENCE: PRESUMPTIONS.** Error cannot be predicated for the admission of alleged incompetent evidence where a cause is tried to the court without a jury; the presumption in such case is that the court considered only competent evidence in reaching his conclusion and judgment.

APPEAL from the district court for Saunders county:
EDWARD E. GOOD, JUDGE. *Affirmed.*

*R. J. Greene, John H. Barry, Riling & Riling and
Lionel C. Burr, for appellants.*

*B. F. Good, B. E. Hendricks, Harding & Owen and
Burkett, Wilson & Brown, contra.*

HAMER, J.

This was an action in the district court for Saunders county brought by the heirs of Christina Rogers to recover their alleged interest in her estate consisting of certain land situated in that county, and personal property which was in her name at the time of her death. The defendants named in plaintiffs' petition were John T. Rogers, James Rogers, Eleanor Johnson Mitchell, Minnie Johnson Hardy, James W. Johnson, Bertha Strahl, Tena S. McGregor, Alexander Dow, and John Martin, as administrator, together with John H. Barry. From a decree for the plaintiffs and the defendant Tena S. McGregor, the other defendants have appealed.

It appears from the record that William Rogers, whose property is the subject of controversy, had for many years been a resident of Saunders county. He first settled on a homestead and afterwards acquired considerable other real estate by purchase. He married Christina E. Stewart in 1883, and from that time until her death, which occurred in 1913, they resided together in Saunders county. Prior to her death William Rogers conveyed all of his property to his wife and the same was in her name when she died. Tena S. McGregor, one of the defendants, was a niece of Mrs. Rogers, and had visited with them for many years and had ministered

Crinkley v. Rogers.

to their comfort. The record shows that after her marriage to Mr. Rogers his wife had inherited a considerable sum of money from her people. That money was used to purchase some of the real estate which was conveyed to her by her husband. Other sums were deposited in the bank at Ceresco. There was an oral agreement between Rogers and his wife that on the death of either the survivor should have all of the property, both real and personal, until his or her death, when it should go to Tena S. McGregor and the other heirs of Mrs. Rogers. This fact seems to be clearly established by the evidence of many competent witnesses. Mrs. Rogers, before her death, made a will by which she bequeathed and devised all of her property of every kind to her husband, William Rogers, who survived her. Her will was duly admitted to probate, and thus William became possessed of the whole estate. Before his death, which occurred on August 6, 1913, he made his will disposing of all the property in his name but contrary to the agreement between himself and his deceased wife. Tena S. McGregor presented his will for probate. The heirs of Rogers contested, and the will was set aside on the ground that he was incompetent to make the same. Tena S. McGregor appealed to the district court. Pending the trial in that court all of the parties to that record entered into a stipulation which provided, in substance, that Tena S. McGregor should have one-third of all the estate, both real and personal, after the payment of Rogers' debts and the costs of the administration, and that her appeal should be dismissed. This stipulation was approved by the district court, and the appeal was accordingly dismissed. Afterwards the heirs of Christina E. Rogers commenced this suit. Meanwhile John H. Barry had obtained an interest in the property through some of the heirs of William Rogers, and he was made a party defendant. Tena S. McGregor, being satisfied with the settlement she had made with the contestants of the will of William Rogers, refused to join

Crinkley v. Rogers.

as a plaintiff, and therefore she was made a defendant. By the decree appealed from Tena S. McGregor was awarded one-third of the whole estate after the payment of Rogers' debts and the costs of administration. The remainder of the estate was given to the other heirs of Mrs. Rogers.

It is the contention of appellants that the decree is not supported by the evidence and is contrary to law. The rule is well established in this state that equity will fasten a trust upon property in the hands of a person who promised to dispose of it by will in favor of another, which will follow it into the hands of personal representatives or grantees without consideration. *Teske v. Dittberner*, 70 Neb. 544. "Where a person, knowing that a testator with whom he has confidential relations in leaving him a devise or bequest intends it to be applied for the benefit of another, either expressly promises or by his action at the time implies that he will carry the testator's intention into effect, and the property is left to him with the faith on the part of the testator that his promises will be kept, he will be held as trustee." *Smullin v. Wharton*, 73 Neb. 667. "In such case, the will has full effect by passing an absolute legacy to the legatee, but equity, in order to defeat a fraud, raises a trust in favor of those intended to be benefited by the testator, and compels the legatee as a trustee *ex maleficio* to turn over the gift to them. The court acts not upon an express trust created by the testator but, on account of the fraud, upon the conscience of the devisee." *Smullin v. Wharton*, 73 Neb. 667; *Pollard v. McKenney*, 69 Neb. 742, 753; *Schneider v. Schneider*, 81 Neb. 661.

Without quoting the evidence, we find that it is clear and convincing that William Rogers agreed with his wife that he would make a will devising and bequeathing the estate which she gave to him by her will to Tena S. McGregor and her other heirs; therefore the court was warranted in decreeing one-third of the property to Tena,

Crinkley v. Rogers.

and the remainder of it to the other heirs of Mrs. Rogers.

Mrs. Rogers left all her estate to her husband by will, relying upon his promise to protect her heirs and carry out her intentions as agreed. He obtained title to all of her estate, being all the property which she had, by reason of his confidential relation, the confidence she had in him, and his agreement to carry out her wishes. To decree the estate to others than her heirs would amount to a fraud which a court of equity should not tolerate.

Appellants also contend that the trial court erred in excluding the proffered evidence of John T. Rogers. It is clear that the witness was directly interested in the subject-matter of the controversy, and under the provisions of section 7894, Rev. St. 1913, his evidence as to conversations and transactions with the deceased was properly excluded. The same may be said as to the proffered evidence of C. H. Slama who was William Rogers' attorney and confidential adviser. Rev. St. 1913, sec. 7898.

Appellants further contend that the court erred in refusing to sustain the motion to correct the testimony of witness C. C. Turney. As we view the record, it speaks for itself, and the court properly refused to make the proffered correction.

As to the assignment of error in receiving certain evidence, it may be said that, where the trial is to the court without a jury, the presumption is that the court considered only competent evidence in reaching his conclusion and judgment.

Finally, the record clearly shows that Mrs. Rogers furnished a large part of the money used for the purchase of the real estate; that she and her husband had frequently and publicly declared that their property should go to Tena S. McGregor and the other heirs of Mrs. Rogers to the exclusion of the heirs of her husband. Tena had visited with them for many years, had ministered to their comfort and their wants, and was entitled

Felthausen v. Greeble.

to one-third of the property granted her by the stipulation on which she dismissed her appeal in the case relating to the contest of Mr. Rogers' will.

We find no reversible error in the record, and the judgment of the district court is

AFFIRMED.

ROSE and SEDGWICK, JJ., not sitting.

JOE FELTHAUSER, APPELLEE, v. ROBERT C. GREEBLE,
APPELLANT.

FILED DECEMBER 19, 1916. No. 19066.

1. **Trial: VERDICT: CONSTRUCTION OF CONTRACT.** It is for the court to construe and determine the meaning of a written contract; but where the pleader is in doubt and sets out the alleged meaning in his pleading, and evidence is introduced by both plaintiff and defendant on that question, a verdict of the jury under proper instructions, not excepted to, should not be set aside.
2. **Appeal: AFFIRMANCE.** A judgment should not be reversed for a refusal to strike such allegation from the petition, when the jury has correctly determined the meaning of the contract.
3. **Brokers: COMMISSIONS.** Where a real estate broker, employed for a commission, presents to the principal a proposed purchaser, it is for the principal to decide whether the person is acceptable; and, if without fraud or concealment or other improper practice, he enters into a binding and enforceable contract for the sale of the land, the broker has earned his commission, and the seller should not be permitted to say that the broker has not complied with the terms of his agreement.
4. ———: **CONTRACTS: SIGNATURE.** The fact that the signature of the broker to the contract appears under the name of one who signed it as a witness is not entitled to serious consideration, where the evidence shows that the broker signed it as a binding contract.

APPEAL from the district court for Otoe county:
JAMES T. BEGLEY, JUDGE. *Affirmed.*

E. F. Warren and W. F. Moran, for appellant.

W. W. Wilson, contra.

Felthausen v. Greeble.

HAMER, J.

This was an action by a real estate agent to recover from the defendant a sum of money which he alleged to be due him, on a written contract, for the sale of defendant's half section of land in Otoe county. The brokerage contract reads as follows:

"Nebraska City, Neb., May 23, 1913.

"This contract entered into this twenty-third day of May between Robert Greeble, party of the first part, and Joe Felthausen, party of the second part, whereas Robert Greeble is the owner of the north $\frac{1}{2}$ of section 28, township 8, range 14, I appoint Joe Felthausen as my sole and exclusive agent for thirty days for the sale of the same. Party of the first part is to have \$48,000, or \$150 per acre for the within described land. Felthausen is to have 1% for his commission for selling the said land and all over and above \$48,000 should be Felthausen's commission. I further agree to pay Felthausen 1% on any other price agreed upon between me and the purchaser that Felthausen may bring, and I close a deal with and receive such earnest money as I agree upon.

"R. C. GREEBLE.

"Witness: L. F. IMM.

"JOE FELTHAUSER."

Plaintiff alleged: (2) That, pursuant to said agreement, plaintiff on May 24, thereafter sold to one Herman Wickhorst said land for the sum of \$50,000, and on said date Wickhorst and said Greeble entered into a valid written contract for the sale of said land, said Wickhorst paying said Greeble in cash the sum of \$3,000 and agreeing to pay him the further sum of \$19,000 on the 1st day of March, 1914, at which time the said Greeble was to make, execute and deliver to the said Wickhorst a good and sufficient warranty deed for said land, and the said Wickhorst was at the same time to give said Greeble a mortgage on said land for \$28,000, that being the remainder of the purchase price, said mortgage to

Felthausen v. Greeble.

run for five years at 5 per cent. per annum interest; that said contract between the said Wickhorst and said Greeble was executed in duplicate, each of said parties retaining a copy; that plaintiff has no copy thereof, and is unable to give all the details thereof, but has set forth the substance thereof. (3) That plaintiff's commission for making said sale is \$2,480, of which defendant has paid only \$480, and that there is still due the plaintiff on account thereof from the defendant the sum of \$2,000, no part of which has been paid, though demanded, with interest from March, 1914, at the rate of 7 per cent. Wherefore he asks judgment for \$2,000 and interest.

Defendant filed a motion requesting the court to strike that part of the petition alleging the meaning of the contract, which motion was overruled.

Defendant also demurred to the petition, and the demurrer was overruled.

The defendant then filed an answer as follows: (1) Denied each and every allegation of the amended petition, not admitted; (2) that said amended petition does not state facts sufficient to constitute a cause of action against the defendant; (3) admits that he paid plaintiff as commissions on his alleged sale and as payment for his services in said transaction the sum of \$480, and alleges that plaintiff received and accepted said sum in full payment for his alleged services, and that this defendant paid the same as and for full settlement, accord and satisfaction for any and all claims the plaintiff had, or might have, against the defendant for any services whatever rendered by plaintiff for the defendant; (4) demands judgment that the action be dismissed and for costs.

The plaintiff replied denying the payment of the \$480 was in full of plaintiff's commission; denies that plaintiff received said payment in full for his said services in making said sale. Further replying plaintiff denies each and all allegations of the answer.

Felthauser v. Greeble.

On the issues thus joined the cause was tried to a jury. Plaintiff had a verdict for \$2,095.22. Judgment was rendered on the verdict, and the defendant has appealed.

It is appellant's first contention that the trial court erred in overruling his motion to strike certain allegations from the petition. As we view the brokerage contract, it was not at all ambiguous and needed no explanation. The matter sought to be stricken from the petition was, to say the most, merely surplusage. The record shows, however, that testimony was received in support of that allegation; and defendant also testified as to his understanding of the contract. This question was submitted to the jury under proper instructions, therefore defendant is not in a position to complain of the ruling.

Appellant next contends that the brokerage contract required plaintiff to sell the land for cash, and he, not having met its requirements, was not entitled to recover. This contention cannot be sustained. The record discloses that, when plaintiff produced the purchaser, the defendant accepted his terms of payment, and a valid and binding contract was entered into for the sale of defendant's land for the sum of \$50,000, on which defendant was paid the sum of \$3,000 as earnest money when the contract was signed. By its terms the purchaser was to pay \$19,000 on March 1, 1914, when he was to have possession of the land, and he was then to execute a mortgage to defendant for \$28,000, the remainder of the purchase price, due in five years drawing 5 per cent. interest.

Where a real estate broker, employed for a commission, presents to the principal a proposed purchaser, it is for the principal to decide whether the person is acceptable; and, if without fraud or concealment or other improper practice, he enters into a binding and enforceable contract for the sale of the land, the broker has earned his commission, and the seller should not be permitted to say that the broker has not complied with the terms of his agreement. *Scully v. Williamson*, 26 Okla. 19, 27

Felthouser v. Greeble.

L. R. A. n. s. 1089; *Lincoln Realty Co. v. Garden City Land & Immigration Co.*, 94 Neb. 346; *Reasoner v. Yates*, 90 Neb. 757; *Wilson v. Mason*, 158 Ill. 304, 49 Am. St. Rep. 162.

It is said in 4 R. C. L. 309: "Once the customer procured by the broker is accepted by the employer, the latter is thereafter estopped from denying the purchaser's ability or willingness to complete the contract, inasmuch as he is not bound to accept the offer of such person without a reasonable opportunity to inquire and satisfy himself in relation to it. Consequently his acceptance should estop him from alleging anything against this claim except fraud on the part of the broker in inducing the acceptance."

The record discloses that defendant paid plaintiff \$480, which was 1 per cent. of \$48,000, and appellant contends that this was full payment of plaintiff's compensation. The evidence does not sustain this contention. Plaintiff produced a purchaser who entered into a contract with defendant by which defendant sold his land for \$50,000. By the terms of the brokerage contract plaintiff was to have all he could obtain for the land above \$48,000 as a part of his commission, in addition to the 1 per cent. on the price fixed by defendant for which defendant was willing to sell. When defendant was paid the \$3,000 earnest money, he paid plaintiff \$480, and nothing was said between them about full payment. That question was submitted to the jury under proper instructions and was resolved against defendant. Therefore we cannot say that the finding of the jury was clearly wrong. The contracts are all in evidence, and were before the jury, and the verdict is sustained by the evidence.

It is further contended that plaintiff only signed the brokerage contract as a witness, because his signature appears at the left-hand side of the agreement under the signature of I. F. Imm, who signed it as a witness. This contention is not entitled to serious consideration,

Evans v. Gilmore.

where the evidence shows that plaintiff signed it as his contract.

After an examination of the entire record, we are unable to say that it contains any reversible error. The judgment of the district court is

AFFIRMED.

SEDGWICK, J., not sitting.

ELIZABETH L. EVANS, APPELLEE, v. ERNEST L. C. GILMORE,
APPELLANT.

FILED DECEMBER 19, 1916. No. 19133.

Landlord and Tenant: LEASE: CONSTRUCTION. Controversy over a lease and contract covering real estate. The substance of the contracts is set out in the opinion. *Held*, the record is free from error, and the judgment is sustained by the evidence.

APPEAL from the district court for Douglas county:
WILLIS G. SEARS, JUDGE. *Affirmed.*

Frank L. McCoy and Weaver & Giller, for appellant.

Berge & McCarty, contra.

HAMER, J.

This case comes here on appeal from the district court for Douglas county, Nebraska. The plaintiff and appellee, Elizabeth L. Evans, brought the action against the defendant and appellant, Ernest L. C. Gilmore. The plaintiff seeks an accounting for the rents and profits of a 240-acre farm, which the defendant has been occupying for a period of more than five years. In her petition the plaintiff also asks for the cancelation of a certain written instrument. The defendant placed the instrument of record. The plaintiff alleges that it is void. She alleges that she was the owner of the 240-acre farm, except 40 acres in which she had an undivided half interest, and that she afterwards purchased the other

Evans, v. Gilmore.

half interest in said 40 acres. She leased the whole 240 acres to the defendant for five years, commencing March 1, 1910. The defendant was to deliver her one-third of all the crops he raised. The lease provided that the tenant should harvest the crops, put the rent share in the granary, and haul and deliver the same to market as the plaintiff wished it to be done.

It is alleged by plaintiff that the defendant violated this lease; that he would not put the plaintiff's share of the grain in the granary by itself; that the plaintiff could never obtain any settlement with the defendant of the crops grown; that the defendant would sell the grain or feed it to the stock, and, except about 1,000 bushels of corn, he never accounted to the plaintiff, and did not pay her any rent, except a very small portion thereof. He appears to have kept several horses and some cattle and a number of hogs, and he fed them out of the crops without taking any rent share from the same. Much of the time the defendant appears to have been busy with a ditching and grading machine working for the neighbors. He apparently had plans for the future improvement of the farm which he never put into effect. He also claims that he made an arrangement by which he was to improve the condition of the farm and have a certain share in the profits in case he should sell the property for a sum above \$16,000. The defendant claims that he took possession under his lease, the lease being for five years, and there was also a contract which, omitting place of execution, date, and signatures, reads:

"It is hereby agreed between the parties, E. L. Evans and E. D. Evans, parties of the first part, and Ernest L. C. Gilmore, party of the second part, to wit: That party of the second part shall have one-half of the sum above sixteen thousand (16,000) dollars for which the land, 220 acres, lying in sections 16 and 21, township 16, range 10, Douglas county, Nebraska, which now is the property of the parties of the first part, may sell. To this estimated value, \$16,000, is to be added whatever

Evans v. Gilmore.

sum the Elkhorn Valley Drainage District may levy upon said land by way of cost for drainage in straightening Elkhorn river and making lateral ditches. And it is hereby further agreed that such party of the second part is authorized and given full authority to deal with said land in regard to the drainage and before the drainage board as if it were his own."

At the same time that it is claimed the foregoing contract was made, February 28, 1910, the lease was made. The lease stipulates that the party of the first part, E. L. Evans and E. D. Evans, wife and husband, leased to Ernest L. C. Gilmore the land described for the term of five years after the first day of March, 1910. The party of the second part, Ernest L. C. Gilmore, covenants that he will do the work in a good and workman-like manner and in good season, that he will plant a certain number of acres in corn, a certain number of acres in wheat, and a certain number of acres in barley, and that he will put 65 acres in grass. There are also in the lease the usual covenants with respect to keeping the crops free from weeds. There is also the agreement to haul the plaintiff's share of the grain to the nearest market at such time as the party of the first part may request.

The defendant claimed that on or about August 8, 1914, he made an oral bargain to purchase the farm, and that under this bargain he made certain substantial and valuable improvements, and he claims a right to the premises by virtue of this oral agreement, as also under the contract in writing. He claimed that this agreement to purchase the farm was oral, but that the plaintiff promised to reduce it to writing. He further claimed that, because of this new contract to purchase the farm, he built a new hog house, and hauled some dirt, and built some fences, and also sowed some wheat and grass, and that he was ready to perform the contract of purchase.

The defendant's possession was acquired under and by virtue of his lease, and his right of possession was never changed under or by reason of his other negotiations with the plaintiff. *Bigler v. Baker*, 40 Neb. 325; *Lewis v. North*, 62 Neb. 552. To take an oral sale out of the statute of frauds, there must be both possession and valuable improvements, and both must be under the contract of purchase, or else there must be a full and complete performance by the vendee. *Teske v. Dittberner*, 70 Neb. 544; *Moline v. Carlson*, 92 Neb. 419; *Damkroeger v. James*, 95 Neb. 784; *Cobb v. Macfarland*, 87 Neb. 408.

In *Teske v. Dittberner*, *supra*, it is said in the fifth paragraph of the syllabus: "Performance of services of such a character that their value cannot be estimated by a pecuniary standard, so that the court cannot restore the promisee to the situation in which he was when the contract was made, or compensate him in damages, is sufficient to take such an agreement out of the statute of frauds." In the same case it is said in the sixth paragraph: "While, in general, a contract for personal service, where full performance rests upon the will of the contracting party, is not specifically enforceable at suit of either party, when such services have been rendered or there has been a substantial performance of his contract on the part of the person agreeing to render them, the reason of the rule ceases, and the contract may be enforced."

In *Moline v. Carlson*, *supra*, it is said: "The rule is now well settled in this court that a parol contract will be enforced by a court of equity, where one party has wholly and the other partly performed it, and its non-fulfilment on the one hand would amount to a fraud upon the party who has fully performed it."

In *Damkroeger v. James*, *supra*, it is said in the syllabus: "Specific performance of a parol contract will be enforced by a court of equity, where one party has wholly and the other partly performed it, and its non-

Evans v. Gilmore.

fulfilment on the one hand would amount to a fraud on the party who has fully performed it."

The foregoing language seems to have been first used in *Kofka v. Rosicky*, 41 Neb. 328. Since then similar language has been used in *Hespin v. Wendeln*, 85 Neb. 172; *O'Connor v. Waters*, 88 Neb. 224; *Peterson v. Bauer*, 83 Neb. 405. An examination of the evidence in the instant case shows that the facts required by the authorities cited do not exist.

The defendant is shown by the evidence to have been an undesirable tenant. He was not a very good farmer, and he kept nearly all that he raised. He also let the farm run down. The improvements that he claimed to have made were of no substantial value. He had no opportunity apparently to fail without improving it.

The defendant in this case married the plaintiff's granddaughter. In looking over the evidence it is suggested to the mind of the writer that the plaintiff was very patient with him. How far the defendant has been influenced in his conduct towards the plaintiff by the fact that he is married to the plaintiff's granddaughter can only be surmised. His testimony concerning the number of acres that he put in corn and the number that he put in wheat is most unsatisfactory, as also the number of acres in rye. He testified that he did not feed any corn in 1913 to his own stock. It is in testimony that he fed out of this corn crop by the wagon-load. He made no division; he kept feeding out of the crop. He did not have any idea of how much timothy hay he used in 1914, but he used all of it, whatever it was. He did not deny what he had done, at least he did not always deny it, but he invariably took the crop. He also was very uncertain concerning the improvements that he had made. He sold the wheat crop of 1914 for \$1.04 a bushel. He was unable to testify to the fact, but he kept the money.

Perhaps the only matter in controversy is the contract that was made at the time the lease was executed, and

the subsequent oral contract. Remember that the defendant's wife is the mother of the plaintiff's great grandchildren. There are some possible matters of embarrassment about this case. There is no controversy about the contract made at the time the lease was executed, except as to the effect of it. The defendant testified that he told the plaintiff that he would take the place and try to make it salable, and that he would build it up, and that he would take it at a valuation of \$16,000, and that the plaintiff should furnish the material, and he would build the place up for sale and receive one-half of the profits above the \$16,000, with the expense of drainage added thereto. The plaintiff understood the defendant wanted the land for five years, and wanted it so that he would not have to move off during that time, and if he did have to move off that he would then be paid for his improvements; that if he built the place up and improved it, and it was sold during the term of his lease, he did not want to lose the value of his improvements. It was thought that some ditching should be done and the buildings painted, and that the crops should be rotated, and the place generally should be improved. If sold, the defendant would have as pay for his improvements half of the excess above the \$16,000, with the expense of drainage added thereto; if the place was not sold, then the defendants would not be damaged; if the place was sold, then he was to receive the sum above mentioned. The defendant did substantially nothing. He cut some brush which was to be used in making an automobile road. He did a little ditching, but he farmed right over the ditch and sowed oats in the bottom of it. The plaintiff paid for all the paint on the house and barn; she also paid for the new pump and the grass seed and materials used in repairs. The agreement made at the time of the lease would seem to have no application to the controversy between the parties, for the reason that it contemplated that a sale might be made. The five years expired. No sale was made. No sale is con-

templated, and the defendant has done nothing to justify any prospect of a sale. He has nothing in the premises to lose. The defendant has no rights under the contract in writing. When interrogated: "Then you are still claiming under exhibit B, are you? still claiming rights under exhibit B? A. No, sir." Notwithstanding what he said, his main contention is the validity of the contract. In *Manning v. Ayers*, 77 Fed. 690, under a similar contract, the court held that it conveyed no interest whatever in the land. There the defendant wanted the land sold so that he might receive half the price of the same above the agreed value at the time the contract was entered into. The court held he was not entitled to such relief.

In *Campbell v. American Handle Co.*, 94 S. W. 815 (117 Mo. App. 19), the plaintiff and defendant entered into a contract for the cutting and delivery to the factory of certain timber. In that case the court said that the plaintiff was only entitled to pay for the timber which he actually cut and delivered; that the contract lacked mutuality, in that it did not bind him to do anything. The court said in the syllabus: "In a contract under which plaintiff was to cut and deliver at defendant's factory timber of certain dimensions, at a certain price, but which did not bind plaintiff to furnish any specified quantity thereof, but left him at liberty to cease cutting and delivering at any time, there was no mutuality of contract." In the body of the opinion it was said: "We think the contract is void for want of mutuality. Plaintiff was not bound to cut and deliver any specific number of cords of bolts or any specific number of feet of saw stocks, nor was he bound to cut all the ash timber on any particular tract of land, or any tract of land."

In *Steinrender-Stoffregen Coffee Co. v. Guenther Grocery Co.*, 80 S. W. (Ky.) 1170, it was said: "As we have said, it is a fundamental principle of law that there must be mutuality in every contract. If one of the parties is not bound, then the other is not. * * * 'There are

many cases in which the offer is definite enough, yet the acceptor, by merely accepting, has really himself promised nothing in return—has not made himself liable for anything—so that, although one is bound, the other is not, and the engagement lacks what is called “mutuality.” In such a case there is not an enforceable agreement. The most frequent example of this principle is when one offers to supply another with such goods of a certain kind as he may choose to order or may wish during a certain time and the other accepts the offer. Here there is no consideration for the promise or offer, for the promisee has not bound himself to anything, and has incurred no legal liability at all.’”

In the contract referred to the defendant did not bind himself to do anything. Even if the contract should be considered as part of the lease because executed at the same time, still the defendant is not bound to do anything in that part of the contract which he signed. As the defendant did nothing which could give him any property in the land, he is not entitled to anything.

In the contract of August 8, 1914, which was oral and was not signed, there was no legal obligation unless defendant did something by reason of the said oral contract which substantially increased the value of the land and which was done because of the contract. The defendant had a lot of hands. They were at work for him in his ditching and grading enterprises. Any increase in the improvements which he made appears to have been made for the purpose of enabling him to take care of these men who were engaged by him to assist him in his ditching and grading work. An examination of appellant's brief and the decisions which he cites shows that the latter are not in point. We refer to the following, and give a statement concerning the cases as we understand them. In *Smith v. Gibson*, 25 Neb. 511, there was a lease for a specific time with rent payable monthly. It contained a proviso that the tenant might purchase the premises for a stipulated price. When notified by the tenant that

Evans v. Gilmore.

he accepted the terms of the purchase, the defendant acquiesced and said that he accepted the offer, but subsequently he refused to convey because, as he alleged, he did not like the man from whom plaintiff was about to obtain the money to complete the purchase. In *Donahue v. Potter & George Co.*, 63 Neb. 128, the contract was not revocable because the parties had gone so far that \$3,000 had been paid and the deeds placed in escrow until the proper payments could be computed and made. In *Dickson v. Stewart*, 71 Neb. 424, it was held, in substance, following *Bigler v. Baker*, 40 Neb. 325: "Want of mutuality is no defense, even in an action for specific performance, where the party not bound thereby has performed all of the conditions of the contract and brought himself clearly within its terms."

In *Bigler v. Baker*, *supra*, if there had been a want of mutuality, it would not be a valid objection to plaintiff's right to recover, because everything was done that it was contemplated might be done. In the instant case nothing was done.

The following statement is, in substance, taken from the appellant's brief: The 240 acres of land in controversy in this case is situated on the Elkhorn river a short distance northeast of Valley. Mr. and Mrs. Evans lived on this land from 1871 to 1891, and were among the prominent farmers in that part of the county. The family consisted of Mr. and Mrs. Evans and six children, among whom were William Evans, the father of the defendant's wife, so that the defendant's wife is the grandchild of the plaintiff. The defendant's father, Captain Gilmore, was also a prominent citizen of Douglas county, and owned one of the best farms between the Evans farm and Valley. His family consisted of several children, among them this defendant, who has been quite active in the affairs of the county, and is at the present time chairman of the drainage board of the Elkhorn Drainage District. A brother, John Gilmore, is president of the Farmers Club at Valley, and another brother is instructor

Evans v. Gilmore.

in the University of Nebraska. So it will be observed at the outset that the families interested in this lawsuit are prominent. Mr. and Mrs. Evans' children, as the court will need to know, are William, Mary (Mrs. T. J.) Oliver, Annie Portlock, Martha Evans, Alvin and Frank. William and Mary were married before the family left the farm, and the others went with their parents to Bethany. William has lived in Nebraska part of the time. The Olivers were for many years at Falls City. The Portlocks were at Havelock or Bethany. Alvin has been for several years at Pullman, Washington, and Frank and Martha have been in Idaho. Alvin has all along been his mother's adviser. This suit was brought by the plaintiff primarily to cancel the contract of February 28, 1910, which gave defendant certain special rights. However, the record in the case is largely made up of testimony with reference to an accounting between plaintiff and defendant for the rents and profits of this farm during the time the defendant occupied it under the aforesaid contract. There are two contracts which form the real basis of this controversy. One is the contract of February 28, 1910, above referred to, providing for the sale of the land and division of the proceeds between plaintiff and defendant; and the other is the contract of August 8, 1914, wherein plaintiff, as alleged, agreed with defendant to sell the farm to him on certain terms and conditions. Both contracts were made at the solicitation of the plaintiff. The former was put into writing and signed. The terms of the latter were agreed upon and set down in a memorandum, but not signed. "The accounting is merely incidental to the main contention of the plaintiff, and was thrown in" to give jurisdiction.

An examination of the evidence shows a long and unsuccessful struggle on the part of the plaintiff to get rid of the husband of her granddaughter. She is justified in not wanting to retain him as a tenant, or in anyway connected with the farm. One of her sons (Alvin) wrote several letters, which are shown by the record and the

Evans v. Gilmore.

briefs. He appears to have been friendly to the defendant until he afterwards lost his patience in attempting to assist the defendant to become reconciled to the idea that his mother should get rid of him as an unprofitable tenant and recover possession of the land. On April 16, 1915, the temporary injunction issued before that time was made permanent. It enjoined the defendant "from asserting, claiming or in any way attempting to enforce any right, claim or title in or to said real estate by reason of a certain agreement dated Bethany, Nebraska, 2/28/10, signed by Elizabeth L. Evans and Ernest L. C. Gilmore, and filed for record by said defendant in the office of the register of deeds of said county of Douglas." The order was to take effect upon the giving of an undertaking in the sum of \$1,500, with an approved surety. The bond was approved. The judgment canceled and annulled the instrument referred to, and enjoined the defendant and prohibited him from ever claiming any right, title, claim or interest in or to said real estate, or any part thereof, and that the plaintiff recover of said defendant the possession of all of said real estate and have a writ of restitution therefor, and "that this decree does not abate any action at law now pending between the parties hereto for the possession of said real estate by plaintiff, and that she may pursue her right of possession therefor, either by writ of restitution herein or by action at law." Concerning the alleged sale of the place, it is sufficient to say that there never was any contract in writing, and that there never were any substantial improvements made on the place by the defendant under the said oral agreement. He did certain things with a view to enabling him to take care of a large number of men in his employ in the ditching and grading business. The plaintiff was averse to selling the land without the consent of her children. She was timid about making bargains with the apparently visionary man who had married her granddaughter.

Evans v. Gilmore.

On Friday evening, August 14, the defendant and his wife came to the home of the plaintiff at Bethany. The next day, which was Saturday, they remained there. Certain of the children were present. There were conversations between the plaintiff and the defendant. It was warm weather, and their conversations appear to have been out in the yard. The defendant seems to have wanted to buy the place for \$18,500, but he did not have anything to pay down. He only wanted to pay 4 per cent. interest, and then he wanted to make a payment, so he said, of \$1,000 a year. The plaintiff and defendant had some conversation. The proposition does not appear to have interested the plaintiff very much, as the terms were not at all satisfactory to her. She said that she would think about it, and the defendant wrote a little paper supposed to contain his offer. The plaintiff appears to have handed this little paper to William, the father of defendant's wife, with a statement that there was Ernest's offer for the land. It is as follows: "Farm Contract of Sale: \$18,500, on ten years time, at 4 per cent. interest, payable semi-annually on October 1st and March 1st each year, together with enough of principal to equal \$1,000 in all, that part of principal to be paid March 1st each year, with privilege of paying all or any part of principal at any time. Interest to date from March 1st, 1915."

It should be remembered that the trial court had the witnesses before it, and the judge saw them, and had an opportunity to judge of their truthfulness. We are unable to say that the judgment of the district court is wrong, and it is,

AFFIRMED.

LETTON, ROSE and SEDGWICK, JJ., concur in the conclusion.

In re Estate of Cormick.

IN RE ESTATE OF THOMAS CORMICK.

MARY CORMICK, APPELLANT, v. FIRST TRUST COMPANY OF
OMAHA, ADMINISTRATOR, APPELLEE.

FILED DECEMBER 19, 1916. No. 19089.

1. **Executors and Administrators: CLAIMS: PLEADING.** Petition examined, and *held* to plead an express contract between husband and wife, and to state the same cause of action as that stated in the claim filed in the county court.
2. **Husband and Wife: CONTRACTS.** An express contract between husband and wife that she shall receive reasonable compensation for extra and unusual services rendered him outside of her domestic duties is valid, and, when established by a preponderance of the evidence, is enforceable as against him or his estate.

APPEAL from the district court for Douglas county:
ALEXANDER C. TROUP, JUDGE. *Reversed.*

Brogan & Raymond and *A. S. Ritchie*, for appellant.

E. W. Simeral, *contra*.

MARTIN, C.

The plaintiff, Mary Cormick, was married to Thomas Cormick on April 22, 1903. For some time prior to the marriage, said Thomas Cormick was a detective, with headquarters at Omaha. He died on April 15, 1913. The First Trust Company of Omaha was appointed administrator of his estate. Mary Cormick filed a claim on December 13, 1913, against his estate, the nature of which is disclosed by the third paragraph of her petition, which is as follows:

"That on May 1, 1903, following her marriage to the said Thomas Cormick, at the special instance and request of the said Thomas Cormick, your petitioner became employed by the said Thomas Cormick to engage herself in the business of the said Thomas Cormick in the capacity of a private detective and assistant to the said Thomas Cormick; that the duties required of her in said

In re Estate of Cormick.

employment consisted of carrying on all correspondence, making out all reports, soliciting work, outlining and detailing instructions to operators (here follows a detailed statement of services performed); that said services were of the reasonable value of \$2 per day."

The administrator filed a motion to dismiss her claim on the grounds: First, that the evidence is not sufficient to establish a claim against said estate in favor of said Mary Cormick; second, that under the facts proved the said Mary Cormick, as the wife of said deceased, is not entitled under the law to make any claim against said estate. The county court found that there was nothing due plaintiff and disallowed her claim. She took an appeal to the district court, and on March 18, 1914, filed her petition in said court, using the same language therein as quoted above. On October 15, 1914, she filed an amended petition in said district court; said amendment consisting of the words, "and the said Thomas Cormick agreed to pay her for her said services what the same were reasonably worth." On November 6, 1914, the administrator filed a motion to strike the said amendment from said amended petition, for the reason that the issues in the district court were changed from what they were in the county court, in that an implied contract was pleaded in the county court and an express contract was sought to be pleaded in the district court. This motion was sustained; and on the same day a demurrer was also sustained, on the ground that the petition did not state facts sufficient to constitute a cause of action. A reversal is asked on the contention that the trial court should have overruled the demurrer to the amended petition, and should not have sustained the motion striking out the amendment to said petition.

Does the petition in the district court state a different cause of action from that stated in the county court? The allegation in both courts is that Mary Cormick became employed at the special instance and request of the said Thomas Cormick to engage herself in the capac-

In re Estate of Cormick.

ity of a private detective and assistant to the said Thomas Cormick. From this phraseology an express contract, rather than an implied one, is alleged, and the word "employed" carries with it an implication to compensate her for the reasonable worth of her services.

"To be 'employed' in anything means, not only the act of doing it, but also to be engaged to do it; to be under contract or orders to do it." *United States v. Morris*, 39 U. S. *464, *475.

The amendment, under the liberality of our statute, should have been permitted as an amplification of the original petition, and should not have been considered as a change of the cause of action or the issues presented to the county court.

The important question to determine is whether, under our married woman's act, a husband and wife may contract with each other with reference to any matter not inherent in the contract of marriage itself. The services for which compensation is asked are not those necessarily involved in household duties or the marriage relation. She is taken from the home under the contract and placed in an office, and required to follow an extraordinary business, that of an assistant to a detective, far removed from the duties devolving upon the wife. The employment itself is evidence that the husband released the wife during the time she was to be engaged in office work for him from any domestic duties which he might have claimed from her by reason of their marriage. Is such a contract enforceable in this state? Common-law disabilities were removed and certain general powers were conferred upon women by the legislature of this state as follows:

Section 1560, Rev. St. 1913: "The property, real and personal, which any woman in the state may own at the time of her marriage, and the rents, issues, profits, or proceeds thereof, and any real, personal, or mixed property, which shall come to her by descent, devise, or the gift of any person except her husband, or which she shall acquire by purchase or otherwise, shall remain her sole and separate property, notwithstanding her marriage,

In re Estate of Cormick.

and shall not be subject to the disposal of her husband, or liable for his debts (except for necessities when execution against the husband has been returned unsatisfied)."

Section 1561: "A married woman, while the marriage relation subsists, may bargain, sell, and convey her real and personal property, and enter into any contract with reference to the same in the same manner to the same extent, and with like effect as a married man may in relation to his real and personal property."

Section 1562: "Any married woman may carry on trade or business, and perform any labor or services on her sole and separate account; and the earnings of any married woman, from her trade, business, labor, or services, shall be her sole and separate property, and may be used and invested by her in her own name."

By these sections, or any part of them, are contracts between husband and wife excepted or prohibited? If not, the husband may contract with the wife, relative to services to be performed by her not inhering in the marriage relation, the same as he may contract with any other person. With reference to such exception, this court has spoken in the case of *May v. May*, 9 Neb. 16, wherein it is said: "This statute defining the rights of married women contains but one allusion to, or exception of, her husband. Property, the gift of her husband, may not remain her sole and separate property, not subject to the disposal of her husband or liable for his debts. In respect to property acquired by her in any other manner than by gift from him, the husband stands in the same relation to her as all the rest of the world. In the grant of general power (if I may use the language) to her to 'bargain, sell, and convey her real and personal property, and enter into any contract in reference to it, to 'sue and be sued,' to 'carry on trade or business, and perform any labor or service on her sole and separate account,' and to use and invest her earnings in her own name, contracts with her husband are not excepted."

In re Estate of Cormick.

Other courts have taken the same view of similar statutes, and hold that contracts between husband and wife for extra and unusual services are enforceable, as will be seen from the following quotation from the supreme court of Pennsylvania: "Where a husband consents to the employment of his wife and agrees that the wages shall be paid to her, she can recover them as against him, and he forfeits and surrenders to her any claim that he might otherwise have to them. A husband may contract directly with his wife for the performance of extra and unusual services in the course of his business outside of the family relation, and such contract will be deemed a waiver by him of all claim to her wages, and she will be entitled to be paid for such services out of the proceeds of a sale of her husband's property." *Nuding & Schlouch v. Ulrich*, 169 Pa. St. 289.

The appellate court of Indiana has passed upon a similar question: "Under Horner's Rev. St. 1897, sec. 5115, abolishing all legal disabilities of married women to make contracts, except to convey real estate or enter into a contract of suretyship, and section 5130, providing that the earnings of a married woman, 'other than labor for her husband or family, shall be her sole and separate property,' a contract of a husband to pay his wife for services as clerk in his store is for a consideration, and valid." *Roche v. Union Trust Co.*, 52 N. E. (Ind. App.) 612. See, also, *Powers v. Fletcher*, 84 Ind. 154; *Moore v. Crandall*, 205 Fed. 689. "A husband can make a valid gift of his wife's services to her, for which she can maintain an action." *Farman v. Chamberlain*, 74 Ind. 82.

The distinction between the ordinary duties devolving upon the wife by reason of the marriage relation and the extraordinary services which she may render for the husband in his business is fully recognized in this state. "The married woman's act does not deprive the husband of his right of action for the loss of services or companion-

In re Estate of Cormick.

ship of his wife, and, notwithstanding that act, he may still recover to the extent that the injury sustained by his wife incapacitated her from performing the duties that reasonably devolve upon her in the marriage relation." *Omaha & R. V. R. Co. v. Chollette*, 41 Neb. 578.

In some jurisdictions contracts of this character between husband and wife have been declared invalid. While this court has never passed upon this particular question, it has decided that the husband, under the married woman's act, is not excepted from its provisions bestowing upon the wife general contracting powers with relation to her separate property and earnings. It follows that the wife may contract with her husband for compensation for services to be rendered by her not within contemplation of the married relation, and the husband is therefore bound by the character of the employment alleged in the petition. In case the claimant is able to show an express contract with her husband for compensation for the services rendered in his office by a preponderance of the evidence, she should be permitted to recover the reasonable value of said services. The trial court erred in sustaining the demurrer to plaintiff's petition. We recommend that the case be reversed and remanded for further proceedings.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings, and this opinion is adopted by and made the opinion of the court.

REVERSED.

AUGUSTA BIERBACH, APPELLEE, v. MUTUAL BENEFIT
HEALTH & ACCIDENT ASSOCIATION, APPELLANT.

FILED DECEMBER 29, 1916. No. 19052.

Insurance: CONTRACT: LIABILITY: ESTOPPEL. A contract of insurance in a mutual assessment company ordinarily consists of the articles of incorporation and by-laws of the association, the application and the certificate, but when such an association sets out, as one of the prominent features of its certificate of membership, a synopsis of its by-laws in such form and substance as to lead the insured to believe that it contained all the provisions of the by-laws which applied to his certificate of membership, the insured may rely upon such synopsis, and, if liability accrues, the association will be estopped to deny its liability under a clause of its by-laws which it lead the insured to either overlook or to believe that it had no application to his certificate.

APPEAL from the district court for Douglas county:
ABRAHAM L. SUTTON, JUDGE. *Affirmed.*

Mahoney & Kennedy, Yale C. Holland and Guy C. Kiddoo, for appellant.

G. W. Shields & Sons, contra.

MORRISSEY, C. J.

Defendant has appealed from a judgment of the district court for Douglas county, in the sum of \$1,000, given on a certificate of membership issued by defendant to one Otto William Bierbach, which certificate was made payable to plaintiff. The first page of the certificate reads as follows:

"Certificate of Membership. Form 10.

"Mutual Benefit Health and Accident Association, Omaha, by this certificate of membership certifies: "That Otto Wm. Bierbach is a member of the Mutual Benefit Health and Accident Association, and while in good standing is entitled to benefits in such amounts, and under such conditions and limitations, as may be provided for in the articles of incorporation and by-laws of said association

Bierbach v. Mutual Benefit Health & Accident Ass'n.

in force on the date of the happening of the event on account of which any claim, under this certificate, is made; said articles of incorporation and by-laws, the application for membership and this certificate shall constitute the contract between the holder thereof and said Mutual Benefit Health and Accident Association.

"In witness whereof, we have hereunto affixed our official signatures and impressed the corporate seal of the association at Omaha, Nebraska, this 8th day of November, A. D. 1912.

(SEAL)

"(Signed) H. S. Weller, President.

"(Signed) C. C. Criss, Treasurer."

The second page, printed in the same size type, is made up of nine paragraphs, duly numbered and subdivided. Omitting those not material here, it reads as follows:

"A Synopsis of Benefits under By-laws Governing Certificate of Membership, Form 10, now in effect.

"Accident Benefits.

"IV. Specific Losses. Whenever a member of this association shall, through external, violent and accidental means, receive bodily injuries which shall, independently of all other causes, result in one of the following specific losses within thirteen weeks from the date of the accident causing said injuries, payment will be made in accordance with the by-laws, not exceeding the following amounts:

Death, loss of both hands, both feet or both eyes.	\$1,000
Loss of one hand or one foot	350
Loss of sight of one eye	250

"General Provisions.

"(f) The right of any member, or person claiming under any membership, to claim weekly benefits or indemnity shall be determined by the provisions of the articles of incorporation and of the by-laws in force at the time the accident occurred, or the disability due to sickness commenced.

"(g) Attention is called to these features of the by-laws, so that misunderstandings may be avoided should occasion arise to make claim. If you do not understand your contract as thoroughly as you might wish, write the home office. Any information within the power of the officers of the association to give will be promptly given."

This is followed on the succeeding page by the application for membership, which is in the usual form of applications for membership in such insurance companies, and includes the following provision:

"I hereby agree that I will accept the certificate of membership which may be issued to me subject to all the provisions, conditions and limitations contained in the articles of incorporation and by-laws of said association, as the same now are or as they may be legally amended and changed, and I agree to comply with all the provisions thereof. * * * I understand that this application is for a certificate of membership, Form 10, paying benefits in accordance with the by-laws, as shown on back hereof."

The original application is not incorporated in the bill of exceptions, and no by-laws are printed on the back of the copy of the application found on the certificate of membership.

While this certificate was in full force, Bierbach died as the result of accidentally taking carbolic acid. This case was tried on the theory that the unintentional or accidental taking of this poison constituted death through external, violent and accidental means, and the only real question in dispute is whether the recovery shall be for \$1,000, as would appear from a casual reading of the synopsis of benefits, or whether the recovery shall be limited to a sum not exceeding \$100, as fixed in subdivision A of section 14, article 13, by-laws of the association, entitled, "Restricted Benefits," and providing: "The accidental taking of poison; then, in all such cases mentioned in this paragraph, the limit of the association's

Bierbach v. Mutual Benefit Health & Accident Ass'n.

liability for weekly benefits, or other indemnity, shall not exceed the sum of one hundred dollars, anything in the by-laws to the contrary notwithstanding."

Defendant maintains that the contract is made up of the constitution and by-laws, the application and the certificate of membership taken together; while, on the other hand, plaintiff points out that this certificate is all printed on one sheet of paper consisting of four pages. The first page contains the certificate proper. The second contains the laws or synopsis of the laws governing and fixing defendant's liability. The third page contains the application, and the fourth page, the usual indorsements put on a policy of insurance.

The synopsis of benefits occupies a full page, the page usually occupied by the general provisions of an insurance policy, printed in large type and designated in the head notes as "Form 10, now in effect," and conveys the impression, not only that it forms a part of the certificate, but that it contains so much of the by-laws as relates to and governs this particular form of certificate. It says that if the insured dies as the result of external, violent and accidental means, the beneficiary shall receive a sum not exceeding \$1,000. There is a total lack of suggestion that the recovery shall not exceed \$100. That the insured came to his death through external, violent and accidental means is in effect admitted under the pleadings and on the theory on which the case was tried. Defendant argues at length that the contract of insurance consists of the certificate, the application and the by-laws, but argument on this point is not necessary. Defendant's proposition stands without dispute. The certificate and application are in evidence and speak for themselves. But what is to be taken as the by-laws? Are we to accept the synopsis of by-laws set out by the defendant itself, and constituting the second page of this certificate of membership, or shall we look to a separate document, which is incorporated in the bill of exceptions and claimed by defendant to be the by-laws governing the associ-

ation and which fix a different liability against defendant from the liability fixed in the synopsis printed on the certificate? The synopsis of benefits points out that in case of death the payment will not exceed the sum of \$1,000. The statute in force at that time, of which the insured will be presumed to have had knowledge, fixed the recovery in a mutual assessment company, such as defendant, at not to exceed one assessment on each and every member in good standing. Reading this provision of the certificate in the light of the statute, any ordinary man would understand that the amount of recovery would be such amount as one assessment would raise, not exceeding the maximum fixed in the certificate.

The concluding clause of the synopsis of benefits is as follows: "Attention is called to these features of the by-laws, so that misunderstandings may be avoided should occasion arise to make claim. If you do not understand your contract as thoroughly as you might wish, write the home office. Any information within the power of the officers of the association to give will be promptly given." It will be noted that special stress is laid "on these features of the by-laws." Thus the unwary is led to believe that "these features" contain the provisions which are applicable to his form of certificate.

In this class of insurance, a contract consists of the articles of incorporation and by-laws of the association, the application and the certificate of membership, but when this association set out, as one of the prominent features of its certificate of membership, a synopsis of its by-laws in such form and substance as to lead the insured to believe that it contained all the provisions of the by-laws which applied to his certificate of membership, the insured had a right to rely upon this synopsis. Having pursued this course of conduct, defendant is estopped to deny its liability under a clause of its by-laws which, we may assume, it led the insured to either overlook or to believe that it had no application to his

Green v. Cudahy Packing Co.

certificate. *Binder v. National Masonic Accident Ass'n*, 127 Ia. 25.

There is only one remaining subject. That relates to the taxation of an attorney's fee. This question has been so thoroughly settled by this court in *Lancashire Ins. Co. v. Bush*, 60 Neb. 116, and cases therein cited, that a discussion of this point will serve no useful purpose. The amount allowed was \$75, a reasonable fee for the service rendered.

The record is found free from error, and the judgment is

AFFIRMED.

SARAH GREEN, ADMINISTRATRIX, APPELLEE, v. CUDAHY
PACKING COMPANY, APPELLANT.

FILED DECEMBER 29, 1916. No. 19078.

1. **Master and Servant: INJURY TO SERVANT: PLEADING AND PROOF: VARIANCE.** Where it is alleged in a petition that a servant fell into an unguarded hole in the floor of a room adjoining the room in which he worked, and the proof shows that the room with the unguarded hole in the floor is in a separate building from that in which the servant worked, but that the two buildings were connected by a foot-bridge, or viaduct, the variance, if any, between the allegation of the petition and the proof is immaterial.
2. ———: ———: **DUTY OF MASTER.** It is the duty of a master to use reasonable care to provide a safe way of ingress and egress to the place of employment.
3. ———: ———: **PRESUMPTIONS.** Where the master has furnished a number of such ways, and has kept them guarded and free from pitfalls, the servant may assume that he will continue to exercise such degree of caution as is necessary to keep these ways safe for passage.
4. ———: **INJURY TO SERVANT: LIABILITY OF MASTER.** And if the master permits one of such ways to be left in an unsafe condition and, as a result thereof, a servant suffers injury, without negligence on his part, the master will be liable.

Green v. Cudahy Packing Co.

APPEAL from the district court for Douglas county:
JAMES P. ENGLISH, JUDGE. *Affirmed.*

James C. Kinsler, for appellant.

Smyth & Schall, Ed. P. Smith and Herman Aye, contra.

MORRISSEY, C. J.

John Green, an employee of defendant, suffered injuries, September 24, 1913, which resulted in his death the following morning. Plaintiff, as administratrix of his estate, brought this action against his employer and recovered a judgment for \$4,365, and defendant has appealed.

Plaintiff alleged that on the evening of the 24th of September, 1913, Green was required to work overtime and remained at his task until after dark; that Green came to his death by reason of the carelessness and negligence of the defendant, in that, in order to leave the room where he was employed, through the customary and usual exit, he passed through an adjoining room, and thence down a stairway to the street; that, in the floor of this adjoining room through which he passed, the defendant had cut a large hole or opening about 20 feet square, that this opening was left unguarded, and the room unlighted, and that Green fell through the opening to his death.

The defendant answers, alleging that the hole or opening, as designated in plaintiff's petition, was not in the floor of the building in which Green worked, but that it was cut in the floor of a separate building belonging to defendant; that Green was employed to work in the "new beef house," and that this opening in the floor had been cut in the "old beef house," and that the old beef house had been condemned several months before, and was on the opposite side of the roadway and about 50 feet distant from the new beef house, and that the hole or opening was about 60 feet in length and 15 feet in width; that the interior of the building was being

Green v. Cudahy Packing Co.

wrecked and demolished preparatory to reconstruction; and that all of these facts were well known to Green. It further alleged that after Green had finished his work for the day he negligently and voluntarily went upon the third floor of the old beef house, "well knowing that it was unlighted, dark and dangerous, and that in so doing he departed from the line, scope and place of his employment;" alleged that there were several safe exits from the room in which Green worked; that Green knew of these exits; that he wrongfully, negligently and voluntarily failed to use any of them; and that if he received the injuries, as alleged in plaintiff's petition, it was through his own negligence and the negligence of his fellow servants; and further that he had assumed whatever risk, if any, there was in entering the partially destroyed building. The reply was a general denial of new matter alleged.

Defendant has made 63 assignments of error, but we shall not undertake to discuss them separately. Indeed, they do not require separate discussion. The principal point urged is that the petition alleged the opening in the floor was in a room adjoining the room in which Green worked, and that the proof wholly failed to show an opening in the floor of any room adjoining this room. Laying aside technical distinctions, it may be said that plaintiff's petition is based on the assumption that the room in the old beef house is a room adjoining the room in the new beef house, though there is a private alley running between the two buildings. Counsel for defendant would have us hold that it is not an adjoining room. There is no plat or drawing of either building pointed out in the record, but, if we understand the testimony of the witnesses, the Cudahy packing plant has many buildings. Among others are the buildings known as the old beef house, and the building known as the new beef house. As may be inferred from their designations, the old beef house was first erected. Later the new building was erected, and there are a few yards

Green v. Cudahy Packing Co.

between the two buildings. There is a discrepancy in the evidence as to the distance they are separated. The testimony varies all the way from 5 or 6 yards to 15 or 20 yards. The distance, however, is not material. The new building stood on higher ground than the old building, and they were connected by a bridge or viaduct leading from the third floor of the old building to the first floor of the new building. The time-keeper's office was so located that many employees in the new building would report at the time-keeper's office in the morning, get their check, or time card, go up the stairs into the old building, pass through this room with the opening in the floor, go over the bridge and into the new building, and return over the same route in the evening to the time-keeper's office. This had been Green's practice for sometime before he met his death. While there were other means of egress from the new beef house, it is made perfectly plain that the route mentioned was at least one of the regular routes followed by the employees of defendant. The opening in the floor had been guarded by putting substantial rails around it, but the men engaged in remodeling the building would, from time to time, remove the guards as they raised or lowered machinery, but when their work was done they would again replace the guards. There is testimony showing that these guards were in place late in the afternoon of September 24, and no person saw Green fall through the opening. Certain conditions are shown, however, and from these it may be assumed that the guards were not in place when he undertook to pass through the room after completing his day's work. One of defendant's foremen was called as a witness for plaintiff, and he testified that about 7 o'clock on the morning of September 25 his attention was attracted to the body of a man lying on the floor below this opening; that he went down and found it to be John Green, who was then alive, but unconscious; that he looked to see if the guards or rails were in place, and that there was, at that time, no guard

Green v. Cudahy Packing Co.

or rail on the east end of the hole—"there was no rail there." Another employee testified to the same thing. Indeed, there can scarcely be said to be a conflict of evidence on that point. There is no dispute about the lack of light in the room at the time Mr. Green quit work and when it is assumed that he met this accident. Appellant says in its reply brief: "There were no electric lights in the old beef house at any time after dark." For the purposes of this review, we may assume that the room was dark; that there was no rail around this hole; and that Green fell therein to his death.

Defendant takes the position that these matters are entirely immaterial; that "Green had no business there; that it was not a place where he was employed, nor where his employment required him to be; that the defendant owed him no duty with reference to the condition of the old beef house, and therefore could be guilty of no negligence toward him, no matter whether the railing was up or down on the morning that he was found in the old building." Practically all of its assignments of error are based on this assumption. If defendant is correct in this, the judgment cannot stand. If it is not right in this assumption, there is little left of its assignments of error. Defendant argues that the proof fails to show any hole in the floor, as alleged in the petition; that this hole which we have described in the old building is not in a room adjoining the room in which Green worked. But we are not impressed with the logic of the argument. Perhaps the petition is more specific than is necessary. It might have been sufficient to allege that as he left the room where he was employed, passing over the usual route of exit, he fell into this hole, without saying that it was in a room adjoining the room in which he worked. But it is evident both from the answer and the proof that all parties understood exactly the location of the buildings, the rooms, and the unguarded hole into which Green fell. No one was misled for a single moment. Defendant says there were

Green v. Cudahy Packing Co.

other means of ingress and egress, but does not point out the testimony bearing out the statements. However, we will assume it to be true. The proof does show that the route taken by Green was one of those usually and customarily taken, not only by him, but by a large number of the employees, with the full knowledge and consent of defendant's superintendents and foremen. It also appears to be the most convenient route. In fact this bridge, or viaduct, seems to have been constructed for that very purpose. It constituted an invitation to the employees to follow that route. The men were seen to go back and forth there daily, and the foreman engaged in remodeling the old building recognized the danger of leaving the opening unguarded, for he had it inclosed with guards and rails. The deceased passed back and forth there daily, undoubtedly observed the guards and relied upon them. This was a large room with some small lights on a distant side thereof, but not sufficient to light that part of the room through which Mr. Green attempted to pass. It was the duty of the employer to keep this hole guarded.

It is not only the duty of the employer to provide a reasonably safe place for his employees to work, but that duty carries with it the obligation to provide a reasonably safe ingress and egress. Of course, defendant argues that it did furnish a safe way of ingress and egress, and that Green was guilty of negligence in attempting to make his departure through this old building. But where the employer has undertaken to furnish a number of such ways, and has kept them guarded and free from pitfalls, the employee may assume that he will continue to exercise such a degree of caution as is necessary to keep these ways safe for passage, and Green was not guilty of negligence in choosing the route, on that evening, which theretofore he had followed with perfect safety and which he might still have followed in safety had the guards been maintained around this opening.

Green v. Cudahy Packing Co.

Neither did he assume the risk of this opening in the floor being left unguarded. He had passed by it from day to day. He had seen it duly protected, and he could not anticipate that it was in a different condition from what he had been accustomed to see it. The workmen employed around this opening might be said to have assumed the risk of such employment, but Green was not so employed, and the assumption of risk cannot be applied.

We cannot undertake to discuss seriatim the numerous assignments made. If we were to adopt defendant's theory of the case, many of them would be good; but we do not adopt that theory, but hold that there is no material variance between the pleadings and the proof, and that this opening in the floor of the old beef house is sufficiently designated in the petition, and, if it is not, the case is one of those falling within section 7706, Rev. St. 1913, providing: "No variance between the allegation in a pleading and the proof is to be deemed material unless it have actually misled the adverse party, to his prejudice, in maintaining his action or defense upon the merits." It follows that each of the assignments based upon this theory are without merit. This applies as well to the exceptions taken to the instructions as to the rulings on the introduction of evidence. The jury were properly instructed. As to the instructions asked by the defendant, they are for the most part based on a theory of the case which we have heretofore said is not sustained, and they were therefore properly denied.

The verdict of the jury is fully sustained, the record is free from error, and the judgment is

AFFIRMED.

FAWCETT, J., not sitting.

Reudelhuber v. Douglas County.

GEORGE REUELHUBER, APPELLEE, v. DOUGLAS COUNTY,
APPELLANT.

FILED DECEMBER 29, 1916. No. 19134.

1. **Negligence: IMPUTED NEGLIGENCE.** "One who is injured by reason of a defective bridge while riding in a private vehicle may recover from a county otherwise liable, notwithstanding the negligence of the driver, which may have contributed to produce the injury, the injured party being free from negligence and having no authority or control over the driver." *Loso v. Lancaster County*, 77 Neb. 466.
2. Evidence examined, and held sufficient to sustain the verdict of the jury.

APPEAL from the district court for Douglas county:
LEE S. ESTELLE, JUDGE. *Affirmed.*

George A. Magney and Ray J. Abbott, for appellant.

Albert S. Ritchie, contra.

MORRISSEY, C. J.

May 25, 1913, one D. W. Wiley, with a party of friends, of whom plaintiff was one, in attempting to drive his automobile across one of defendant's bridges, forming a part of the public roadway, collided with a guard, or railing, of the bridge. Plaintiff was thrown out of the automobile and suffered a fractured knee. He brought suit against the county, alleging that the iron guard rail at the west end of the bridge, and on the south side thereof, had become loosed from the clamp by which it had been fastened to the frame of the bridge, and had been so bent that it protruded into the roadway two or three feet; that this condition had existed so long that the defendant county in the exercise of ordinary care and diligence had knowledge of the defect.

The answer denies that the bridge was out of repair; alleges that the guard rail was in its proper place, and that the automobile was negligently driven against the frame of the superstructure of the bridge, thereby breaking the guard rail loose from its fastening.

Reudelhuber v. Douglas County.

Appellant in its brief states the issues, as follows: "The question at issue in the case is whether or not Douglas county was negligent in maintaining the bridge upon which the plaintiff was injured, and, if it was negligent, was the plaintiff injured by reason of such negligence on the part of the county, and, if he was so injured, the amount of damages he suffered."

By its third instruction, the court told the jury: "The county is liable for an injury caused by an unsafe and defective condition of a county bridge, notwithstanding the fact that no actual notice of said condition had previous to the occurrence of the accident been given to any officer of the county concerned, where the defects were of such a nature or had existed for such a length of time that by the exercise of ordinary care they might have been discovered and repaired."

Appellant concedes that this instruction correctly states the law, but argues that the evidence is insufficient to sustain the findings.

The driver testified that as he approached the bridge there was another automobile approaching from the other direction, and this compelled him to keep to the right-hand side of the road; that he saw the rail protruding into the roadway at the bridge, but was so close to it that he could not avoid the collision. He says he swung the front of the car toward the center of the driveway, and thus avoided a collision with that part of the machine, but he was so close to the protruding rail that it caught the fender about the middle of the car and wedged itself between the rear wheel and the body of the car, causing the car to stop instantly. In this he is fully corroborated by one of the passengers. Of course, this testimony does not prove that it had been out of condition for such a length of time as would be notice to defendant and its officers; but there is also evidence showing the condition of the clamp designed to hold the rail in place. The clamp was filled with dirt, which indicates that the rod had been loose for some

time. There is also evidence of a bend in the rail and rust spots upon the rail, and these are said to indicate that the bend had existed for a considerable period of time.

Defendant offered the testimony of witnesses who passed over the road frequently, one of whom had walked across the bridge the day the accident occurred. They testified that the bridge was in proper condition; but there was nothing to expressly direct their attention to this rail. The jury, under the direction of the court, made an examination of the bridge. They must have been impressed with the condition in which they found the rail and clamps, and we cannot say that under the evidence, which their observation enabled them to understand, the verdict is so unsupported that it must be overthrown.

In the assignments of error formal complaint is made of the instructions given, but they are not further urged in the brief, and these assignments will be treated as waived.

It is urged, however, that the court erred in failing to submit for the consideration of the jury the question of the contributory negligence of the plaintiff because the proof shows that the automobile, at the time it approached the bridge, was being driven at a rate of speed in excess of 8 miles an hour. It is provided by section 3049, Rev. St. 1913: "Upon approaching an intersection of highways, or a bridge, or a sharp curve, or a steep descent, or another vehicle, or an animal, or person outside of any village or city, the person operating a motor vehicle shall reduce the speed of such vehicle to a rate not to exceed eight miles an hour and shall not exceed such speed until entirely past such intersection."

The statutory rate of speed was not alleged in the pleadings. The answer merely alleged that the automobile was being driven in a careless and reckless manner, and was driven against the superstructure of the bridge. The instructions given by the court are sufficient.

Nelson v. Spratt.

ly explicit to cover all issues raised by the pleadings. If defendant desired a more explicit instruction, it ought to have made a seasonable request. Even had request for the instruction been made, it would not have been error to refuse it. Plaintiff was free from blame, and the rule is laid down in *Loso v. Lancaster County*, 77 Neb. 466: "One who is injured by reason of a defective bridge while riding in a private vehicle may recover from a county otherwise liable, notwithstanding the negligence of the driver, which may have contributed to produce the injury, the injured party being free from negligence and having no authority or control over the driver."

We cannot say that the verdict is unsupported by the evidence. The jury was correctly instructed, and the judgment is

AFFIRMED.

FAWCETT, J., not sitting.

BETTY C. NELSON, APPELLANT, v. FLOYD SPRATT, APPELLEE.

FILED DECEMBER 29, 1916. No. 19016.

1. **Bastardy:** TRIAL: INSTRUCTIONS. In the trial of a bastardy case it is the duty of the court, when requested, to give the jury a cautionary instruction in accordance with section 361, Rev. St. 1913.
2. ———: ———: ———. After giving such an instruction it is prejudicial error to charge the jury that, if they find that the plaintiff has testified falsely in regard to any material fact, they may disregard all of her testimony, unless the same be corroborated by other testimony or evidence.

APPEAL from the district court for Antelope county:
ANSON A. WELCH, JUDGE. *Reversed.*

Fred H. Free, for appellant.

Kelsey & Rice, *contra*.

BARNES, J.

This was an action commenced by Betty C. Nelson, an unmarried woman, against Floyd Spratt, charging him with being the father of her bastard child. The cause was tried to a jury in the district court for Antelope county. The jury returned a verdict of not guilty, and the defendant was discharged. The plaintiff has brought the case to this court by an appeal.

Among the numerous errors complained of, plaintiff contends that the trial court erred in charging the jury as follows: "Instruction No. 3. Requested by defendant. You are instructed that, if you find that the plaintiff has testified falsely in regard to any material fact, you may disregard all of her testimony, unless the same be corroborated by other testimony or evidence."

Appellant's argument is that this instruction is erroneous, because it singles out and calls attention to her evidence alone, and states that the jury may entirely disregard it. It is further contended that the rule, "*falsus in uno, falsus in omnibus*," is not correctly stated, because the words "has knowingly testified falsely to a material fact" are omitted. This question was before the court in *Argabright v. State*, 49 Neb. 760, where it was said: "The jury are the sole judges of the credibility of witnesses, and it is error for a trial court, in a criminal case, to single out a particular witness for the defense, by name, and give to the jury a cautionary instruction which applies directly to his testimony the rule of '*falsus in uno, falsus in omnibus*.'"

Appellee contends that this rule has no application in civil cases; that, this being a civil case, the rule should be disregarded. In 38 Cyc. 1736, the rule in civil cases is stated as follows: "The instruction must be general and extend to all witnesses, whether testifying in person at the trial or by deposition. A proposition of law laying down a rule of evidence should be given in general terms, and not stated as being applicable to one certain witness or to one class of witnesses." In 1 Thompson,

Trials (2d ed.) sec. 2423, it is said: "It is accordingly error, in formulating a cautionary instruction under this head, to omit the words 'knowingly,' 'wilfully,' 'intentionally,' or some equivalent expression. The judge is not at liberty to say: 'If you find that the testimony of A. B. was false,' etc., 'you may disregard all his evidence.'"

It is defendant's contention that this rule is abrogated by section 361, Rev. St. 1913, and by the declaration of this court in *Stoltenberg v. State*, 75 Neb. 631, and *Quinn v. Eggleston*, 76 Neb. 409.

Section 361 provides: "When such accused person shall plead not guilty, * * * the court shall order the issue to be tried by a jury; and at the trial of such issue the examination before the justice shall be given in evidence, and the mother of the bastard child shall be admitted as a competent witness, and her credibility be left to the jury: * * * and on the trial of the issue the jury shall in behalf of the man accused, take into consideration any want of credibility in the mother of the bastard child; also any variations in her testimony before the justice and that before the jury; and also any other confession of her, at any time, which does not agree with her testimony, or any other plea or proofs made and produced on behalf of such accused person."

In *Stoltenberg v. State*, *supra*, the provisions of the foregoing section were considered, and it was held: "In a bastardy proceeding in which the defendant denies his guilt, the jury, if the defendant so requests, should be instructed in accordance with the provisions of section 5, ch. 37, Comp. St. 1903, so far as applicable to the testimony, and it is error to refuse to so instruct." The same rule was announced in *Quinn v. Eggleston*, *supra*. The record in the case at bar shows that the court properly instructed the jury as provided by section 361, and in this no error was committed. It has never been held by us that the trial court should be permitted to give an instruction like the one of which plaintiff complains.

Koran v. Cudahy Packing Co.

When the trial court has charged the jury as required by section 361, the rights of the defendant will have been fully protected, and it is reversible error to single out the plaintiff and charge the jury that, if they believe she has sworn falsely as to any material fact, they may disregard all of her testimony, unless the same be corroborated by other testimony or evidence.

When we consider the fact that plaintiff's intercourse with the defendant might be known only to the parties themselves, and her testimony as to that fact could not ordinarily be corroborated by the direct testimony of other witnesses, it is apparent that the giving of the instruction complained of might be prejudicial.

The judgment of the district court is reversed, and the cause is remanded for further proceedings.

REVERSED.

MORRISSEY, C. J., not sitting.

PETER KORAN, APPELLEE, v. CUDAHY PACKING COMPANY,
APPELLANT.

FILED DECEMBER 29, 1916. No. 19077.

1. **Jury: IMPANELING: PEREMPTORY CHALLENGES.** A custom prevails in Douglas county in civil cases that eighteen jurors who have passed their *voir dire* examination be called into the jury box, and counsel for each side then strike off three names peremptorily. Counsel for defendant, after striking the names of three jurors in this manner, was denied the right to challenge three other jurors peremptorily from the twelve remaining in the box. *Held*, that having acquiesced and participated in peremptorily challenging three men in accordance with this custom, the defendant waived its right to exercise other or further peremptory challenges.
2. **Master and Servant: INJURY TO SERVANT: LIABILITY OF MASTER.** Where a foreman ordered a workman to hurry, and furnished him a defective box to stand upon, in order to facilitate the work he was doing, the defect in which was not obvious to the workman,

Koran v. Cudahy Packing Co.

he was entitled to rely upon the foreman's selection of the box as a safe place upon which to stand.

3. **Appeal: CROSS-EXAMINATION.** A judgment will not be reversed merely on account of an extended cross-examination on an immaterial matter, unless it clearly appears that the substantial rights of defendant have been prejudiced.
4. **Master and Servant: ACTION: APPEAL: EVIDENCE.** Where there is direct testimony that the plaintiff, who has theretofore been in sound health, received an injury to the abdomen from striking the edge of a vat over which he was working, on account of the slipping of a defective box on which he stood, which resulted in a severe pain and a bruised condition of the lower abdominal region, and was soon followed by hernia, an operation for which was performed in a short time, it was not erroneous to permit certain medical witnesses to testify that hernia might have resulted from such a fall.

APPEAL from the district court for Douglas county:
ALEXANDER C. TROUP, JUDGE. *Affirmed.*

James C. Kinsler, for appellant.

Herbert S. Daniel, John A. Moore, B. H. Dunham and Herman Aye, contra.

LETTON, J.

The plaintiff, a man about 25 years of age, was a workman in the employment of defendant at its packing house in South Omaha. It was his duty two or three times a week to remove sides of pork from certain wooden pickle vats about four feet deep and four feet across, in which the meat was pickled in a solution of salt and water. The water had been let out of the vat about nine days before. Plaintiff used a hook with which to pull the meat out of the vat. He piled it on a truck and took it to the butchers in an adjoining room to be trimmed and prepared for market. He had been engaged in this employment for about three years under the same foreman. On the day of the accident he had emptied one truck-load. He testifies that as he was starting the second load the foreman ordered him to hurry, saying that there were six butchers waiting for

Koran v. Cudahy Packing Co.

him, without meat, and asked him why he did not take a box to stand on. Plaintiff answered that he had nothing for that purpose. The foreman then kicked a box over to him against the vat and told him to stand on it. The box was a soap box about two feet long, eighteen inches wide, and nine inches deep. While plaintiff was standing on this box with his head down in the vat, reaching to the opposite side, and pulling a piece of meat with the hook, the box tilted and slipped backwards from underneath him, allowing him to fall upon the edge of the vat, bruising his body and causing severe pain in the lower part of his abdomen. After the accident he examined the box and found that a part of the side and one end, about two inches deep, was split off from the bottom edge, so that as he reached over it tilted and slid along the floor, causing the fall. He felt severe pain about three inches below the navel and three inches to the right of it. He felt weak and vomited, and afterwards the parts began to swell and became discolored. He consulted Dr. Riley, the doctor at the plant, about 4 o'clock the same afternoon, and he sent him to Dr. Koenig. The room in which he worked was about 100 feet square filled with tanks in rows, with no windows. It was lighted by small electric lights, apparently carbon lamps about 25 or 30 feet apart. The box was brought into the room by the foreman. After he fell he explained to the foreman that the box tilted, and he said that he saw that box yesterday, it was broken, and he forgot to throw it away. He went to Dr. Koenig's office, to Dr. Chaloupka, and afterwards to Dr. Lord, on Dr. Koenig's recommendation. Under Dr. Lord's direction he was taken to the hospital and operated upon for inguinal hernia. After being out of the hospital eight or nine days Dr. Lord sent him back, and performed a second operation upon him for appendicitis. The accident was on March 13, 1912. In September, 1913, he was sent to the hospital again by Drs. Chaloupka and Tyler, where he was kept in bed for

Koran v. Cudahy Packing Co.

about a month for rectal treatment. He had never had any pain or difficulty with his bowels before the accident. Since the first operation he has had a lump upon his left side about two inches thick and three or four inches long, and often has cramps on that side. He had this trouble at the time of the operation for appendicitis. He again went to the hospital in March, 1914, where he remained 58 days in bed for treatment for the same trouble, and again in August. He has not been able to work since the injury, except about six days, and has constant pain. At the time he was hurt he was earning 19 cents an hour and worked from 10 to 15 hours a day, making from \$56 to \$62 a month. He had never been sick before the accident. He has lost 30 pounds in weight. He has spent about \$1,296 for doctors and hospital expenses. On cross-examination it was shown that he actually paid but a small part of the fees due for medical care. Two other witnesses corroborated his testimony as to the use of the box, and told of his gestures and of his expressions of pain. For the defense, the foreman denied giving him any directions to use a box that day, denied furnishing him a box to stand on, and denied remarking about its condition afterwards. It was proved without dispute that it was a common thing for men engaged in taking meat from the vats to use boxes to stand on, which they procured from an adjoining room. There was testimony—disputed—to the effect that, when one Hall was sent with plaintiff to inquire into the accident, he did not say that the foreman had given him the box or ordered him to stand on it. A verdict of \$20,000 was rendered for plaintiff. Defendant appeals.

In its brief defendant has set forth 204 assignments of error. Many of these relate to matters, as to which, even if it be conceded that error occurred, it was obviously not prejudicial to defendant. The presentation of so many points, many of which cannot have been seriously relied upon for a reversal, entails needless work both upon counsel and upon the court, and is a practice not

Koran v. Cudahy Packing Co.

to be commended. It is the duty of the court under section 7713, Rev. St. 1913, to disregard any error in the proceedings which does not affect the substantial rights of the complaining party, and no judgment can be reversed for any such error.

The first assignment relates to the refusal by the court to sustain defendant's objection to questions asked on the *voir dire* examination of jurors as to their acquaintance with the Casualty Company of America, and the further inquiry as to whether the juror was a stockholder or officer or in any way interested in a casualty company. Under the circumstances, to the writer's mind it seems that these questions were asked, not for the *bona fide* purpose of ascertaining whether the jurors had a legal interest in the Casualty Company of America, but for the purpose of insidiously and by indirection presenting to their minds the idea that an insurance company was defending the case, and not the Cudahy Packing Company. However, in *Egner v. Curtis, Towle & Paine Co.*, 96 Neb. 18, this court held that such examinations may be permitted, and the district court was justified in following that decision.

It is next assigned that the trial court erred in denying defendant's request for leave to exercise its right of peremptory challenges against three jurors, the request being made before the jury was sworn. It is said that the courts in Douglas county have adopted the practice of calling eighteen jurors into the box to be examined upon their *voir dire*, and counsel for each side are then directed to strike off three names, thus reducing the panel to twelve. Counsel for defendant, after striking the names of three jurors in accordance with this custom, desired to challenge three more from the twelve jurors remaining in the box. Having acquiesced and participated in removing three men peremptorily in accordance with the custom, defendant waived its right to exercise peremptory challenges by the other method.

Koran v. Cudahy Packing Co.

The next point argued is that, since the box upon which the plaintiff stood was a simple appliance, the case falls under the doctrine announced in *Vanderpool v. Partridge*, 79 Neb. 165, that, while the law requires the master to provide reasonably safe tools and appliances, yet the rule has no application where the servant possesses ordinary intelligence and knowledge and the tools and appliances furnished are of a simple nature in which defects can be easily observed by the servant. But if the plaintiff's testimony is true, the foreman admonished him to hurry, and selected a defective box, which he kicked over toward him, and told him to stand upon it. Plaintiff had no opportunity, and, under such circumstances, it was not his duty to examine the box. He had a right to rely upon the foreman's selection of a safe place upon which to stand. The rule in *Vanderpool v. Partridge*, *supra*, does not apply.

Several other assignments of error are based upon the contention that the principles set forth in a number of the instructions given by the court are not applicable to the facts in the case, and were therefore prejudicially erroneous, and that the evidence does not sustain the verdict. Of course, if the facts in the case had been found by the jury to be as the defendant insists, then the instructions would have been erroneous; but the evidence warranted the jury in taking a different view. The instructions were not inconsistent with the evidence, viewing it from the plaintiff's standpoint.

Over 30 assignments of error are made with respect to the admission of the testimony of certain medical witnesses. The court permitted a very extended examination of each of these witnesses by defendant. Among the complaints is that the court permitted each of these witnesses to testify that hernia *might* have resulted from a fall that plaintiff describes. There was direct testimony as to the condition of plaintiff for several years before the injury, and as to his appearance and condition almost immediately afterwards. When this

Koran v. Cudahy Packing Co.

evidence is considered in connection with that of the two doctors, we can see no prejudice to defendant in the admission of their testimony.

It is contended the evidence does not justify a finding that either hernia, appendicitis, or a spastic condition of the colon was the result of the accident. It is shown that in many instances such a fall would not cause a rupture, but there is nothing to show that plaintiff was ruptured before he fell. He was soon afterwards operated upon for hernia. It is also shown that in such cases it is not infrequent that the appendix slips down with the intestines into the scrotal cavity and is often irritated and inflamed as a result of this displacement; that plaintiff suffered from pain on both sides of the abdomen after the operation for hernia; that this was diagnosed as caused by appendicitis, and that he was operated upon and the appendix removed. The pain continued on the left side, and an X-ray examination shows that a spastic condition of the colon continued after both operations, and from which plaintiff still suffers. The medical testimony shows that these contractions of the colon are due to a failure in nerve control of the peristaltic motion. Plaintiff was treated in the hospital for some time for this affection, and the doctors testify it may continue indefinitely.

Considering all the evidence, it is sufficient to justify the finding by the jury that the hernia and resulting complications were caused by the fall. Much complaint is made as to the latitude of cross-examination of a witness who had investigated the accident soon after its occurrence for the attorney for defendant, and of the request or demand made in the presence of the jury that he produce a copy of the report he made to his employer. Much of the examination was immaterial, and, to use a slang expression, the demand for a copy seems to have been "a grand-stand play," and should not have been made, but still we would not be justified in reversing the judgment on that ground.

State, ex rel. Nebraska State Railway Commission, v. Missouri P. R. Co.

As to the amount of the judgment, if the doctors are correct, the spastic condition of the colon is apt to continue indefinitely and to cause great pain and annoyance. Plaintiff suffered great pain, had several operations, lay in hospitals for months, and has been unable to work much since. He was 25 years old when hurt and has a long expectancy.

The judgment seems excessive but plaintiff has remitted all damages in excess of \$5,000. The judgment is therefore reduced to the sum of \$5,000, and, as so reduced, is

AFFIRMED.

STATE, EX REL. NEBRASKA STATE RAILWAY COMMISSION,
APPELLEE, v. MISSOURI PACIFIC RAILWAY COMPANY,
APPELLANT.

FILED DECEMBER 29, 1916. No. 19004.

1. **Statutes: CONSTRUCTION.** A statute susceptible of a reasonable construction avoiding a conflict with the Constitution should be so construed.
2. **Carriers: TELEPHONES: STATUTE: CONSTITUTIONALITY.** The statute requiring common carriers to furnish adequate telephone connections between their offices, buildings and grounds and the local telephone exchange, provides for a notice and a hearing before the state railway commission as to the reasonableness of such requirement, and is not unconstitutional as depriving the carrier of its property without due process of law or as denying it the equal protection of the laws. Rev. St. 1913, secs. 5988-5990, Laws 1909, ch. 106, secs. 1-3.
3. **Mandamus: ORDERS OF RAILWAY COMMISSION: PRESUMPTIONS.** On application for mandamus to enforce an order of the state railway commission, jurisdiction having been acquired and no appeal having been taken, it will be presumed that the findings of the commission were sustained by the evidence.
4. **Statutes: CONSTITUTIONALITY.** "The failure of the presiding officer of the senate to sign a bill, which was afterwards approved by the governor, and which the journal of the senate shows passed the senate by the constitutional majority, does not affect the validity of the act." *Taylor v. Wilson*, 17 Neb. 88.

State, ex rel. Nebraska State Railway Commission, v. Missouri P. R. Co.

APPEAL from the district court for Lancaster county: WILLARD E. STEWART, JUDGE, *Affirmed.*

B. P. Waggener, J. A. C. Kennedy and Yale C. Holland, for appellant.

Willis E. Reed, Attorney General, and George W. Ayres, contra

ROSE, J. -

The Nebraska State Railway Commission, relator, applied to the district court for a peremptory writ of mandamus requiring the Missouri Pacific Railway Company, respondent, to provide telephone service in the station at Panama in compliance with an order made by relator under a statute providing:

"Every railway company, express company or telegraph company doing business in this state shall furnish reasonably adequate telephone connections between its offices, buildings and grounds, and the public telephone exchanges operated in the towns where the same are located."

"The state railway commission is hereby authorized and empowered to require and compel the furnishing of such service. Upon complaint to the railway commission of Nebraska that any telephonic service with any railroad, telegraph or express company's buildings, offices or grounds is inadequate or in any respect unreasonably or unjustly discriminatory or that such service cannot be had, it shall be the duty of the commission to investigate the same, and if upon investigation the commission shall find that any telephonic service is inadequate or unreasonably or unjustly discriminatory or that such service cannot be had, it shall determine and by order fix a reasonable regulation, practice or service to be installed, imposed, observed and operated in the future." Rev. St. 1913, secs. 5988, 5989, Laws 1909, ch. 106, secs. 1, 2.

Respondent resisted the application for the writ on the ground that the act is unconstitutional as denying

State, ex rel. Nebraska State Railway Commission, v. Missouri P. R. Co.

respondent the equal protection of the laws and as depriving it of property without due process of law. The trial court upheld the act and allowed the writ. Respondent has appealed.

It is argued that respondent is required by the act to furnish telephone connections between its offices, buildings and grounds and the local telephone exchange without regard to necessity or expense, and *Missouri P. R. Co. v. State of Nebraska*, 217 U. S. 196, is cited to sustain the position thus taken. The reasons for condemning the act assailed in that case are not applicable to the legislation now under consideration. Respondent's construction of the enactment relating to telephones is not the only one of which the act is susceptible. There is a reasonable interpretation which will avoid a conflict with the Constitution and it should be adopted. *State v. Howard*, 96 Neb. 278, 291; *Gaster v. Gaster*, 92 Neb. 6, 10; *State v. Smith*, 35 Neb. 13, 24. The legislation authorizes the state railway commission to exact the service described in the act. There is no penalty prescribed except for a failure to perform a service ordered by the state railway commission. The act seems to contemplate the right to be heard before that body and the determination by it of the reasonableness of the service. This interpretation is a reasonable one and avoids a conflict with the Constitution. Under the act thus construed, respondent had a hearing before the state railway commission and was ordered to install a telephone at Panama.

Does the order deprive respondent of its property without due process of law or deny it the equal protection of the laws? Respondent contends that the service required is not essential to the proper operation of the railroad as a common carrier of persons and property, and that the use of a telephone would be a mere accommodation to the inhabitants of the village at the expense of respondent without benefit to it. The duties

State, ex rel. Nebraska State Railway Commission, v. Missouri P. R. Co.

of a common carrier are not limited to the actual transportation of persons and property. There are other obligations incidental to the principal duties. The furnishing of adequate facilities for the transaction of public business is a function of a common carrier. It may be required to establish stations at proper places. *Minneapolis & St. L. R. Co. v. State of Minnesota*, 193 U. S. 53. The duty to provide adequate facilities is not performed by supplying a minimum of service. The state may, within proper limits, require a carrier to furnish facilities for the convenience and comfort of the traveling public. *Missouri P. R. Co. v. State of Kansas*, 216 U. S. 262, 280; *Atlantic Coast Line R. Co. v. North Carolina Corporation Commission*, 206 U. S. 1. The telephone is in general use as a factor in the transaction of public business, and a statute requiring a railroad company to connect a station with a local telephone exchange for the convenience of shippers and passengers does not go beyond the incidental duties of a common carrier. *Atchison, T. & S. F. R. Co. v. State*, 23 Okla. 210. The evidence in the present case tends to show that the telephone is a necessary facility for the proper performance of respondent's duties as a common carrier. While the element of expense should be considered in determining the reasonableness of the requirement, it is not necessarily controlling. *Missouri P. R. Co. v. State of Kansas*, 216 U. S. 262; *Atlantic Coast Line R. Co. v. North Carolina Corporation Commission*, 206 U. S. 1, 26. In the case last cited it was said: "As the primal duty of a carrier is to furnish adequate facilities to the public, that duty may be compelled, although by doing so as an incident some pecuniary loss from rendering such service may result."

The statute under which the state railway commission acted is not unconstitutional. That body had jurisdiction of the subject matter and of the parties affected by the order. The statute not only gave respondent the right to be heard, but authorized an appeal to the district

State, ex rel. Nebraska State Railway Commission, v. Missouri P. R. Co.

court. Laws, 1907, ch. 90, sec. 7. The proof does not show that an appeal was taken. Under such circumstances it will be presumed, in an action for mandamus to enforce the order, that the findings of the state railway commission were sustained by the evidence. In resisting the application for the writ respondent has not shown that the requirement was unreasonable or confiscatory.

The conclusion is that the order is not unconstitutional as depriving respondent of its property without due process of law or as denying it the equal protection of the law. *Missouri P. R. Co. v. State of Nebraska*, 217 U. S. 196, relied upon by respondent, is not controlling here. It was there held that an act requiring every railroad company to construct switch tracks to elevators adjacent to the right of way was unconstitutional, because it required the carrier to construct a switch at its own expense, upon demand of an elevator owner, without a preliminary hearing as to reasonableness or necessity, under a severe penalty for noncompliance with the demand. Moreover, the supreme court of the United States indicated that the service required by the elevator statute was not incidental to the duties of a common carrier, but was a service for the benefit of a private individual or a corporation, and not for the general public.

Respondent also contends that the act now under consideration is unconstitutional because the enrolled bill was not signed by the presiding officer of the senate. Const., art. III, sec. 11. This question is settled adversely to respondent by former decisions. It has been held:

"The failure of the presiding officer of the senate to sign a bill, which was afterwards approved by the governor, and which the journal of the senate shows passed the senate by the constitutional majority, does not affect the validity of the act." *Cottrell v. State*. 9 Neb. 125; *Taylor v. Wilson*, 17 Neb. 88.

The judgment is therefore

AFFIRMED.

Ryan v. Bullion.

ROBERT RYAN, APPELLEE. V. CLARK BULLION ET AL., APPELLANTS.

FILED DECEMBER 29, 1916. No. 18953.

1. **Judgment: RES JUDICATA** The judgment in one action will not bar a subsequent action unless it appears that the subject-matter is the same in both actions, and was or might have been litigated in the former action. The parties to such former action will not be estopped thereby to litigate questions in a subsequent action which the court in the former action refused to determine for want of jurisdiction.
2. **Attorney and Client: ATTORNEY'S FEES: QUESTION FOR JURY.** The defendants, residents of another state, employed an attorney of their place of residence to have full charge of their interests in this state, and it does not appear that they placed any limitations upon his authority to employ local counsel in their litigation here. Plaintiff rendered legal services in defendants' litigation here, with the knowledge of the attorney in the other state, who corresponded with him as one of the attorneys for defendants in that litigation. There is evidence that plaintiff relied upon defendants for compensation, and no evidence that plaintiff had any reason to expect compensation for his services from any one other than these defendants. *Held*, that the question of defendants liability for such services is one of fact to be determined by the jury.
3. **Appeal: VERDICT.** If three persons are sued jointly and there is proof of joint liability for part of plaintiff's claim, a verdict under suitable instructions for so much of the plaintiff's claim as defendants are jointly liable for will not be set aside as unsupported by the evidence, although it appears that there was no joint liability for some part of plaintiff's claim.
4. **Limitation of Actions.** If an attorney undertakes to attend to such litigation as may arise out of the settlement of an estate and to wait for compensation until the proceeds of the litigation are realized, the statute of limitations will not begin to run against the attorney's claim for compensation for services so rendered until the litigation in settling the estate is ended.
5. **Garnishment: VOLUNTARY PAYMENT.** If, upon an attempted garnishment, money is voluntarily paid into court by the defendant's debtor, the order of the court directing that it be applied upon the judgment of the plaintiff against the defendant in the litigation in which the money was so paid in will not be set aside upon appeal on motion of defendant, solely because of insufficiency of the garnishment proceeding.

Ryan v. Bullion.

APPEAL from the district court for Lancaster county:
ALBERT J. CORNISH, JUDGE. *Affirmed.*

W. G. Hastings and Anderson & Baylor, for appellants.

Hall & Bishop and Robert Ryan, contra.

SEDGWICK, J.

The plaintiff began this action in the district court for Lancaster county upon a claim for services as an attorney at law rendered for these defendants. He attached to his petition an itemized statement of the services for which he claimed compensation, which contains different items of charges from January 30, 1902, to December 3, 1910. He alleges in his petition that he was employed by the defendants "as their attorney to represent them and protect their interests in the matter of the estate of James M. Bullion, deceased, whose estate was being administered in Saline county, Nebraska, and that Curtis W. Ribble was the duly appointed administrator of said estate; that this plaintiff rendered various and sundry services for the defendants at their request and with their knowledge and consent in the matter of said estate, during the time extending from January 30, 1902, to December 3, 1910; * * * that the plaintiff also advanced certain moneys for court costs and expenses in connection with said litigation," and admitted that \$43.65 had been repaid plaintiff "for said advancement." He asked judgment for \$809.81 and interest from January 1, 1911.

The defendants answered separately. The defendant Clark Bullion answered that he is, and at all times mentioned in the petition was, a resident and a citizen of the state of New York, and that the statute of limitations in that state is six years, and that all charges prior to June, 1907, were incurred in the year 1904 and prior thereto, and that the plaintiff's action as to this defendant is barred by the statute of limitations, and this defendant denies that he ever employed the plaintiff

Ryan v. Bullion.

"in any manner to look after or protect defendant's interests generally in the estate of James M. Bullion, deceased, and never employed nor requested nor authorized the employment or had any knowledge of the employment of said plaintiff in or about this defendant's interests in said estate in any of the state courts of Nebraska, or in any of the matters mentioned in plaintiff's petition, or in any way, except in procuring an accounting by said Curtis W. Ribble as administrator of said estate in the federal courts of the state of Nebraska, for which services the said plaintiff has received the full amount of his demands."

The defendant Laura A. Ames also pleaded the statute of limitations of New York in substantially the same way, and then alleged that "in the summer of the year 1901 she employed George H. Hastings of Crete, Nebraska, through one J. D. Reed of Richfield Springs, New York, and through one William G. Hastings, then of Wilber, Nebraska, to present for this defendant a claim against said estate arising upon a promissory note for the sum of \$500 principal and accrued interest, and on September 24, 1901, said George H. Hastings presented a petition for leave to file said claim, and it was refused by the county court of Saline county on the ground that an order barring presentation of further claims had been entered in said estate August 28, 1901. Pending the hearing of the application to file said claim, the said George H. Hastings, without consultation with either the said J. D. Reed or with William G. Hastings, and without knowledge of this defendant, employed said plaintiff, this defendant is now informed, to assist in procuring the allowance of said claim, and the only matter this defendant ever had pending in any state court of Nebraska before January 1, 1906, was this one for enforcement of the said claim; and the employment of the said plaintiff in and about the enforcement of such claim was wholly unauthorized by this defendant, and any liability for fees and disbursements for such serv-

Ryan v. Bullion.

ices remained at all times and is now against said George H. Hastings and not against this defendant." The defendant Nettie Furmin filed a separate answer, alleging substantially the same defense as the defendant Ames.

The plaintiff for reply alleges: "By way of estoppel and bar to the defenses attempted to be stated in said answers," that his employment by said defendants to represent them in and protect their interests against the estate of James M. Bullion and to enforce their claims against said estate and against Curtis W. Ribble, the administrator of said estate, included his employment in the suit in the federal court, and one of the essential issues in the said action in said federal court, was the employment by the complainants therein of the plaintiff herein for the performance of all of the services covered by the entire bill above referred to, including the bill for services described in the petition herein, which issue of employment was up for consideration and adjudication, and, by said action and decree for the establishment of the attorney's lien, was adjudicated and settled in favor of the employment of the plaintiff by the defendants therein, whereby the defendants are herein estopped to deny said employment by them, and their denial constitutes no defense to said action.

The jury returned a verdict in plaintiff's favor for \$426, with interest \$98.42, amounting to \$524.42.

These defendants were the heirs of James M. Bullion, deceased, who died in Saline county in this state. It appears that there was a variety of litigation arising out of the settlement of this estate in the county court of Saline county, in the district court for that county, in the supreme court of the state, and also in the federal court for this district, continuing during the times stated in the plaintiff's action for professional services. It also appears that the plaintiff rendered the services for which he has charged, and that the value of the services so rendered by the plaintiff is not seriously contested.

Ryan v. Bullion.

It will be seen that the pleadings of the parties are somewhat complicated, and the plaintiff himself with his counsel and the counsel for the defendants have presented full and exhaustive briefs upon questions of law which they assume are involved in this litigation, but we have had some difficulty in ascertaining how some of these questions of law are applicable to the disputed facts involved in this record.

It appears to be conceded that the plaintiff was employed by these defendants to bring an action in the federal court, which was begun in December, 1904, and that he rendered the necessary services for which he charged in that action, and it is also conceded by the plaintiff that he was allowed by the federal court, and had received, compensation for his services in that action. The record shows that the plaintiff presented to the federal court his claim for services, including the charges which are involved in this litigation, and that the federal court allowed him in those proceedings compensation claimed by him for his services in that court, but the federal court refused to allow or consider in that case his claim for compensation in the state courts, for which this action is brought. There was no finding that plaintiff was not employed in the state courts. Such a finding under the order there made would have been dictum only. It would seem, therefore, that the plaintiff is in error in supposing that the order of the federal court and the actions of these defendants in connection therewith would estop these defendants to now contest his claim for services in the state courts.

The defendants present two principal questions for consideration: (1) The defendants contend that the plaintiff was not employed by them in any of this litigation in the state courts or in their behalf by any one who was authorized by them to so employ him, and that they had no knowledge that he had been so employed or was rendering his services with the expectation of being compensated therefor by them. (2) It appears that

Ryan v. Bullion.

they contend that all services rendered by the plaintiff prior to the commencement of the action in the federal court on the 2d day of December, 1904, were completed, and his right of action, if any, thereon accrued prior to the commencement of that action in the federal court, and his claim therefor is barred by the statute of limitations.

It appears that the defendants all reside in the state of New York and have so resided during all of the times of this litigation. They employed one Reed, a local attorney there, who had charge of their interests. Mr. Reed appears to have had full charge for them of their interests, and it does not appear that they placed any limitations upon his authority to act for them in the matter of employing local counsel here. The defendant Ames testified that she had no personal acquaintance with the plaintiff, and had no correspondence with him personally; that all her communications with him had been conducted through Mr. Reed, but that she could not state definitely when she first learned of Mr. Ryan's employment, and that she had never employed *directly* any other person than Mr. Reed, and, when asked the specific question, "State whether or not you have ever authorized the employment of Mr. Robert Ryan on your behalf?" she answered, "I never did *directly*." This of course is an admission that Mr. Reed had authority on her behalf to employ this plaintiff. The defendant Clark Bullion testified that he received all communications from the plaintiff through Reed; that he first became interested in the litigation, "I think about the time my aunt's claim against the estate was sent out there." This was one of the claims filed with the Ames and Furmin claims, and was at the commencement of the litigation for which the plaintiff claims fees. He testifies that he had no personal interest in that claim, and was only interested in it as executor and legatee of his aunt, who died after the claim was filed. He signed a stipulation to dismiss those claims, and he

Ryan v. Bullion.

testified that the attorney, Reed, suggested that he sign it. He also testified that he never authorized any general employment of plaintiff to represent or look after his interests in the estate, and that he had no knowledge that he was looking after it, except in the matter of the action in the federal court, in which the witness was a party plaintiff. The correspondence in evidence shows that Mr. Reed knew that this plaintiff was actively assisting in all of this complicated litigation in behalf of this estate of which these three defendants were the heirs, and there is no evidence of any circumstances indicating that Mr. Reed had contracted with any other attorney here to render all necessary services, or to procure them to be rendered, or to suppose that this plaintiff was relying on any one other than these defendants for compensation for his services. So far as we have observed, the evidence is not very satisfactory as to when the defendant Clark Bullion, through his attorney Mr. Reed, made himself responsible for services rendered by this plaintiff. The litigation which he authorized, and which was brought in his name in the federal court, recognized the former litigation and attempted to realize the results thereof, so that this defendant made himself responsible jointly with the other defendants for a considerable part of the services rendered by the plaintiff.

The questions presented were difficult and complicated, and it was perhaps unfortunate that it was required to submit them to the consideration of the jury under such exhaustive instructions covering all of the various issues in the case. The trial court might perhaps have determined many of the questions presented, and so might have simplified the instructions given to the jury, but it does not appear that any more simple method of submitting the case was suggested and insisted upon, and the jury by the verdict allowed the plaintiff only for a part of the services rendered. Under the instructions the jury might render a joint verdict against all of the

Ryan v. Bullion.

defendants for such services as they found they were all jointly liable for, and it does not clearly appear that this verdict is for a larger amount than that for which these defendants were jointly liable. The jury under the instructions were not allowed to find against any of the defendants except for those services for which they were all liable, and the defendants Ames and Furmin cannot, of course, complain that by reason of this fact they have been relieved from some liability.

As to the statute of limitations, we find that the record shows that the plaintiff wrote Mr. Reed in the latter part of 1904 in regard to costs advanced. "They amounted to almost \$100 which General Hastings and I will try to carry until we get something out of the estate." This seems to have been acquiesced in by Mr. Reed, and indicates an understanding that settling with the attorney would be postponed until the litigation was ended. There were other circumstances from which the jury might find that the employment was a continuing one. The result of the whole litigation was that these defendants realized a considerable amount as heirs out of the estate of James M. Bullion, which at times during the progress of the litigation seemed very doubtful. While the facts in the case are complicated, and not very clear, we cannot say we have found such errors in the trial of the case as to require a reversal.

It appears that, after the judgment had been rendered in the district court in favor of the plaintiff, some of the proceeds of the Bullion estate had come into the hands of the court, and a motion was made by the plaintiff to apply these proceeds upon his claim. This motion was sustained and the court ordered the proceeds to be so applied. From that order the defendants also appealed to this court, and upon motion that appeal was consolidated with this case. It appears that in the order so consolidating it, by a clerical error, the record was made to show that this case was consolidated with case No. 18403 that had already been determined by

Foltz v. Maxwell.

this court. It is therefore ordered that that clerical error be corrected so as to show the fact as above stated.

Some questions are presented in regard to the proceedings in the nature of attachment and garnishment, by which the proceeds of the Bullion estate were brought into the trial court. If we were required to reverse the principal judgment of the trial court, those questions might become of importance, but this money was voluntarily paid into court. It is conceded that it belongs to defendants, and, as it will require an order of the trial court to dispose of the money in its hands belonging to these defendants, we think that court has jurisdiction to order so much thereof as is necessary to be applied on the plaintiff's claim.

The judgment of the trial court, and the order applying the money in the hands of the court upon that judgment, are both

AFFIRMED.

FAWCETT, J., not sitting.

JOHN D. FOLTZ ET AL., APPELLEES, v. CHARLES H. MAXWELL, ET AL., APPELLANTS.

FILED DECEMBER 29, 1916. No. 18970.

1. **Homestead.** If man and wife reside in a building upon two ordinary town lots owned by them for several years and have no other home, such building will, while they make their home therein, constitute their homestead as against their creditors, although they have, during their residence therein, conducted a hotel in such building.
2. ———. Under such circumstances no formal declaration that they have selected such property as their homestead is necessary.
3. **Executors and Administrators: SALE OF HOMESTEAD: LACHES.** A homestead is not subject to administrator's sale to pay debts of the deceased owners thereof as against their children and heirs;

Foltz v. Maxwell.

but, if such sale is duly ordered and is in all respects regular, and the children and heirs, with knowledge of the sale to an innocent purchaser, acquiesce therein for more than five years after becoming of legal age, knowing that the purchaser is in the meantime making valuable and permanent improvements of the property, such conduct and laches will estop them to maintain an action in equity to establish an interest in the property.

APPEAL from the district court for Dakota county:
GUY T. GRAVES, JUDGE. *Reversed, with directions.*

R. E. Erans, for appellants.

J. J. McAllister and W. V. Steuteville, *contra*.

SEDGWICK, J.

These plaintiffs began this action in the district court for Dakota county to set aside an administrator's deed and to establish and quiet their title in two lots in the town of Dakota City in that county. Their father and mother owned these lots, and died intestate. An administrator was appointed of their respective estates, and, upon proceedings brought for that purpose, the administrator sold the lots at public sale to pay claims allowed against the estate of the decedents. The district court determined that the lots constituted the homestead of the decedents, and that the administrator's sale was void, and quieted the title of the plaintiffs in the property. The defendants have appealed.

It is conceded that the proceedings that resulted in the administrator's sale were regular in form and were sufficient to pass the title if the property had been subject to the debts of the decedents. The plaintiffs contend that the property constituted the homestead of the decedents and was not subject to sale for their debts. The defendants present two questions: First, they contend that it is not sufficiently shown that the property was the homestead of the decedents; and, second, that the plaintiffs are estopped by their conduct and their laches to claim any interest in the property as against the defendants.

Foltz v. Maxwell.

1. The decedents occupied the property and conducted a hotel therein. They had done so for several years, and it is contended by the defendants that their occupancy was only for the purpose of conducting a hotel, and that they, nor either of them, had never selected the property as a homestead. These decedents had lived in this property for more than five years, and had made it their home, and there is no evidence that they had any other home or any other property. No outward act of selection of a homestead is necessary under such circumstances, and we are satisfied that the property was the homestead of the decedents, and was not of greater value than \$2,000, and was therefore not subject to the payment of their debts.

2. The other question is a more difficult one. At the time of the sale of the property by the administrator some of these plaintiffs were of legal age, and the others became of legal age soon thereafter. The property was in a dilapidated condition, and its use was of little if any value, and the defendants at once began substantial and permanent improvements. The finding of the trial court that they expended a large amount for such improvements is fully justified by the evidence, and after they had made most of these substantial improvements, and while they were continually improving the property, and after these plaintiffs had arrived at full legal age, the plaintiffs watched the progress of these improvements, saw them from day to day, and delayed the commencement of this action for more than five years. The plaintiffs' attorney alleges that both the plaintiffs and the defendants knew that the defendants' title was void, and that the plaintiffs were continually asserting their rights to the property, and that the defendant Maxwell was seeking by negotiations to complete his title; but the plaintiffs' attorney does not refer us to parts of the record that will establish this condition of things, and we have not found such evidence in the record. On the other hand, the defendants in their

State, ex rel. Barnum, v. Omaha & C. B. Street R. Co.

briefs refer us to evidence which tends to show that the plaintiffs, some of them, assisted in making the improvements in the employment of the defendant Maxwell, and were by him paid in full for their services in so doing, and that the other plaintiffs made no claims to the property until this action was begun, and that the defendant Maxwell bought the property in good faith, and paid its value therefor at the time, and considered that his rights were perfect, as his generous investment in improving the property would also indicate. Under these circumstances we think that the plaintiffs, by their conduct and their silence, encouraged the defendant Maxwell in making these improvements, and, by their laches in so long delaying their action, are not now in a position to assert any equities in the property.

The judgment of the district court is reversed and the cause remanded, with instructions to enter a decree quieting the defendants' title in the property.

REVERSED.

FAWCETT and HAMER, JJ., not sitting.

STATE, EX REL. W. H. BARNUM, APPELLEE, v. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLANT.

FILED DECEMBER 29, 1916. No. 18981.

1. **Municipal Corporations: USE OF STREETS.** A city of the metropolitan class has control of its streets, and, while it cannot prohibit the general and ordinary use for which the streets are constructed, it is within the reasonable discretion of the authorities of such city to prescribe the uses to which a street may be put and to regulate the traffic thereon.
2. ———: ———. Moving a building along a street, although not for the benefit of the city itself or its inhabitants generally, may be considered a public use of the streets in the sense that the public generally may be permitted to so use the streets; and the city authorities may allow such use of the streets.

State, ex rel. Barnum, v. Omaha & C. B. Street R. Co.

3. ———: ———. Under a general ordinance of the city requiring companies using or operating poles and wires to temporarily remove the same to allow the passage of buildings which it may be necessary to move along or across any street, an ordinance giving a franchise to a street car company, which provides that such company shall so construct its track "as to present the least possible obstruction to the ordinary and public use" of the street, may be construed to include the moving of buildings along the street as a public use of the street, and to require the company to temporarily remove its wires to allow the passage of buildings, when found by the proper authorities to be necessary.
4. **Constitutional Law.** Under such conditions, an ordinance requiring the company to pay the necessary expense of such removal of the wires is not unconstitutional as depriving the company of its property without due process of law.

APPEAL from the district court for Douglas county:
WILLIS G. SEARS, JUDGE. *Affirmed.*

John L. Webster and William Ross King, for appellant.

John P. Breen, contra.

SEDGWICK, J.

The district court for Douglas county granted the relator a peremptory writ of mandamus commanding the respondent "to forthwith temporarily hoist or elevate or, if necessary, temporarily remove the overhead electric wires and wire works maintained by it at the crossing or intersection of Eighteenth street and Burt street, in the city of Omaha, so as to allow the passage and moving of the building now in the street at said intersection and about to be moved across said crossing by the relator, Barnum, the cost of so elevating or removing, temporarily, said wires and wire works shall be borne by the respondent, Omaha & Council Bluffs Street Railway Company." The respondent has appealed to this court.

The relator is a house-mover, and is licensed as such under an ordinance of the city of Omaha, which provides: "It shall be unlawful for any person other than a licensed house-mover to move, raise, lower or support on temporary blocking or jacks or wedges any building or any wall or a part of a wall of any building within the corporate limits of the city of Omaha. * * * The

State, ex rel. Barnum, v. Omaha & C. B. Street R. Co.

bond required to be filed by any applicant for a license as house-mover shall be in the sum of three thousand dollars (\$3,000) with good and sufficient securities.

* * * Before moving any building upon, along or across any public street, alley or any public ground in the city of Omaha, a permit shall be first obtained from the building inspector by such licensed house-mover, which permit must be countersigned by the city engineer, authorizing and allowing such house-mover to move the building designated upon, along or across the streets necessary to be crossed. It shall be the duty of the city engineer to determine upon what streets it shall be necessary for the house-mover to cross in the moving of any structure, and he shall designate the streets upon, over and across (which) such building or structure shall be moved.

* * * It shall be unlawful for any such house-mover under the permit to move the structure for which permit is given over, upon or along any other street than the streets mentioned in the permit. * * * Before a permit is issued for any of the operations defined by this article, and before any of the operations defined therein shall have been begun, the building inspector shall examine the building, structure or part thereof on which it is desired to perform such operations, and said building inspector shall refuse to grant a permit for same if any of the following conditions are found to exist. No building shall be moved, in the city of Omaha, which is in such condition that it is worth less than fifty per cent. of the cost of a similar new one. * * * Whenever it shall be necessary for any licensed house-mover to move along or across any street, alley, or other public thoroughfare or public property, any building or other structure of such height or size as to interfere with any wires, cables or other overhead work or the poles or other supports of such overhead work belonging to any individual, association or corporation operating and maintaining same in accordance with any ordinance of the city of Omaha relating thereto, such party or parties,

firm or corporation or as many of them as are jointly operating such overhead work and the supports thereto shall, within twelve hours after written notice has been served severally upon each local manager, agent, or other person authorized to accept legal service, temporarily remove such overhead work and such supports thereto as shall be necessary to allow such building or structure to pass. The expense created by such removal and replacing of said overhead work and the supports thereto shall be born by the person, association, firm or corporation, or all of them, operating and maintaining such overhead work and the supports thereto."

The respondent contends that this provision requiring them to bear the expense of removing and replacing their wires is unconstitutional and void, because it amounts to taking of their property without compensation. Many cases are cited from various courts holding that the moving of buildings along the public streets of a city is an extraordinary and unusual use of the streets, and also cases are cited holding that, when a city has granted a franchise to a corporation to construct a public improvement requiring the erection of poles and wires over the streets of the city, and requiring the corporation, in consideration of the franchise, to render specified services to the city and the inhabitants thereof, and the corporation has accepted the franchise, and in compliance therewith has erected and maintained its poles, and wires and is performing the duties imposed upon it by its franchise, it is beyond the power of the authorities of the city to allow any extraordinary and unusual use of the streets that will interfere with the necessary poles and wires, properly placed and used by the corporation in accordance with the terms and regulations of its franchise, to the damage of the property of the corporation so being used. These authorities hold that, under such conditions, the franchise constitutes a contract between the city and the corporation that is binding upon the city and its authorities. The respondent

State, ex rel. Barnum, v. Omaha & C. B. Street R. Co.

says in the brief: "We would be free to admit that, if the franchise of this appellant company required it to remove the wires at its own expense for a house-mover we would not be in a position to complain." For the purpose of this decision, then, we may concede the principle announced in these authorities, without committing ourselves to their general application to conditions in our state, and dispose of the case upon the construction of the provisions of the franchise of the respondent corporation and the ordinances of the city. The respondent corporation purchased the rights of three several corporations under their respective franchises. Each provided that the grantee should so construct its railway tracks and appliances "as to present the least possible obstruction to the ordinary and public use of said streets." These franchises were granted in 1887 and 1888, and subsequent to the enacting of an ordinance in 1886 which provided: "Whenever it shall be necessary for any person to move along or across any street or alley any vehicle, structure or buildings of such height or size as to interfere with any telegraph, telephone or electric wire poles or wires, the company or companies using or operating such poles and wires shall, upon receiving twelve hours notice, temporarily remove such poles or wires as will allow or admit of the passage of such vehicle, structure or building." The question is whether this ordinance of 1886 and these provisions of the franchise ordinances enacted thereafter, and the ordinance above quoted which required such companies to pay the expense of removing their obstruction to the passage of buildings along the street, can be construed together so as to give force to them all and render them consistent with each other. The two ordinances, if construed together without reference to the franchise ordinances, would of course require the companies to pay such expense. The argument of the respondent corporation is that these franchise ordinances, in the provisions that the "track of said company shall

State, ex rel. Barnum, v. Omaha & C. B. Street R. Co.

be so constructed and maintained as to present the least possible obstruction to the ordinary and public use of said streets and avenues," exclude the idea that it can be held to avoid obstruction of extraordinary and unusual use of the streets. It is said that the movement of buildings along highways is neither an ordinary nor a public use of the highway. It appears that two licensed house-movers were examined as witnesses on the trial of the case. One of them testified that from 1887 about 500 or 600 houses were moved each year across the streets of the city. The public use of the streets may mean either a use for the benefit of the public, or a use by the public generally. As the city has control of its streets, and, using a reasonable discretion, can regulate the traffic thereon and prescribe the uses to which a street may be put, not, of course, prohibiting the general and ordinary use for which the streets are constructed, it is manifest that the authorities of the city may within reasonable limits determine what is and what is not a public use of the streets. In providing, as these ordinances do, that under suitable regulations and restrictions the public may use the streets for the movement of buildings, it must be conceded that the authorities have not exceeded their power nor abused their discretion. The ordinance of 1886, therefore, in the light of the subsequent franchises, must be held to declare that the movement of buildings along the streets is a public use of the streets, and that the provisions of the respective franchises of the respondent corporation's constituent companies that they must not with their appliances obstruct the public use of the streets forbids their preventing such movement of buildings. Under such a franchise contract it is not an abuse of authority to require the corporation to bear the necessary expense of preventing such obstruction. The trial court has so construed these franchises, and the judgment is therefore

AFFIRMED.

ROSE and FAWCETT, JJ., not sitting.

100 Neb.—46

PHILIP FASSLER, APPELLANT, v. RUDOLPH STREIT ET AL.,
APPELLEES.

FILED DECEMBER 29, 1916. No. 19036.

1. **Equity: SUIT FOR PURCHASE PRICE: EQUITABLE DEFENSE.** In an action in equity to recover the remainder of the purchase price of land, the general rule that he who seeks equity must do equity applies, and the purchaser of the land may show any equity in his favor which will reduce the amount of the recovery.
2. **Pleading: CONSTRUCTION.** Doubtful language in a pleading will be construed against the pleader. The reply in this case amounts to an admission that the land in question was the homestead of the deceased owner and his family, and that an administrator's sale to pay debts of the deceased was invalid and not sufficient of itself to convey the interests of the heirs.
3. **Vendor and Purchaser: ACTION: NOTICE: JUDGMENT.** One who has conveyed land with covenants of title is entitled to notice and an opportunity to defend an action against his grantee contesting such title. But if he has notice of the pendency and character of the action, and fails to defend, he will be bound by the judgment therein.
4. ———: ———: **OFFSET.** In such case, if the judgment determines that parties contesting the title of the grantee under his deed have an interest in the land in derogation of the title guaranteed by the deed, and determines the value of that interest, the grantee in the deed may pay such adverse claim and offset the same against his unpaid purchase price of the land.

APPEAL from the district court for Webster county:
HARRY S. DUNGAN, JUDGE. *Affirmed.*

Bernard McNeny, for appellant.

L. H. Blackledge, contra.

SEDGWICK, J.,

A former trial of this case in the district court for Webster county resulted in a judgment for the defendant. Upon appeal to this court the judgment was reversed, 92 Neb. 786. It was determined that the plaintiff was not an innocent holder of the note in suit under the law

of negotiable paper, and the cause was remanded to the district court for a trial of the alleged defense. Upon the second trial the judgment was again in favor of the defendant, and the plaintiff has appealed. The principal facts in the case are sufficiently stated in the former opinion. Several questions are now presented as to the sufficiency of the defense.

The question whether an action can be maintained for breach of a covenant of title in a deed before there has been an eviction is discussed in the briefs. That question frequently becomes of much importance, but does not seem to have any application in an action in equity to recover the balance of the purchase price of the land. In such action the general rule that the plaintiff in an action of equity must do equity applies with full force, and there can be no question that, in an action in equity to establish a lien upon land for the remainder of the purchase price, the purchaser may show any equity in his favor which will reduce the amount of recovery. The judgment hereinafter referred to in favor of the heirs of Paulson established such equity in favor of the defendant.

The defendant bought this land of Johnson for the agreed price of \$1,800. He paid \$500 cash, and the note and mortgage in this suit were given for the remainder of that agreed purchase price. Afterwards Streit paid \$300 on the note. Johnson deeded the land to the defendant with a general covenant of title. Johnson derived his title through an administrator's deed. It is alleged by the defendant that the administrator's deed did not convey a complete title. He alleges the land was a homestead, and was not subject to sale for the debts of the deceased owner, and that some of the heirs of the deceased had brought and were prosecuting an action to establish their interest in the land. The question whether the land was a homestead and the administrator's sale was void is discussed in the briefs, but we do not regard that as an open question under the pleadings

and evidence in this case. The defendant alleged that the land was the homestead of the deceased, and the plaintiff in reply alleged that the widow and children "concluded to abandon said land and seek a home and living elsewhere, * * * their homestead right in said land was of no value," and other similar allegations, and while there was a formal denial of "the allegations in the first four paragraphs of section six of said answer except as herein admitted," which sections of the answer included the allegation of homestead, he admits "the ownership and occupancy of said land by Nels Paulson at the time stated." No act of selection of homestead is necessary, and an intention of removing from the land and seeking a homestead elsewhere will not divest the land of its homestead character before such removal is effected. Taken together with the other allegations in the reply, and this admission of ownership and occupancy at the time of his death, if it was intended to take issue upon the homestead character of the land, there should have been more specific allegations explaining how he owned and occupied it with his family and still the land was not a homestead. We must therefore consider under these issues that the land was a homestead, and that the administrator's sale for the payment of debts of the intestate was ineffectual to pass the title.

It is contended that Johnson was not a party to an action in which the interest of the heirs was determined, and that Johnson was a necessary party because that judgment would fix the amount of his liability for the breach of covenant in his deed. This contention of the plaintiff cannot be sustained. There is no doubt that Johnson was entitled to notice of the pendency of that action, and was entitled to an opportunity to defend it, but this he had. There was an attempt made to bring him into the action. A summons was issued against him, and he had other express notice of the pendency and character of the case which gave him an opportunity to appear and defend his interests in the case if he de-

Fassler v. Streit.

sired to do so. This is all that was required. Johnson was at liberty to either appear and defend the case in his own interests, or to leave the defense to other parties interested. That action of the heirs was defended by the present defendant Streit, and was pending at the same time with the case at bar. Judgment was rendered therein in the district court before the first judgment was rendered in the case at bar, and the defendant in this case answered that he was intending and preparing to appeal to this court from the judgment in favor of the heirs. This defendant failed to perfect his appeal in that case, and, when this case was remanded to the district court, the suit of the heirs had been finally determined. It is alleged that the conduct of this defendant in failing to perfect his appeal from the judgment of the heirs was fraudulent, and that he purposely prevented Johnson and this plaintiff, as assignee of Johnson's mortgage, from contesting the claim of the heirs. But it does not appear that there was any legal defense against the claims of the heirs. In fact the contrary appears, since the land was the homestead of the deceased and his wife, and the administrator's sale could not convey the interest of the heirs to Johnson.

The judgment in favor of the four children of the decedent gave them a four-fifths interest in the land subject to their mother's life estate, so that, as to the four-fifths of the land, the title conveyed by Johnson to Streit entirely failed. The court in the case at bar found that the land, when the heirs obtained their judgment, was of the value of \$4,000. It is not clear what the value of the mother's life estate was, but it evidently was not of great value. How much, then, should be deducted from \$3,200, the value of four-fifths of the land, on account of the mother's life estate, is uncertain. The proceeds of the administrator's sale were used in payment of a mortgage placed upon this land by Nels Paulson and his wife. The defendant Streit was, by the decree of the court, subrogated to the right of the mort-

Allaire, Woodward & Co. v. Perfection Remedy Co.

gagee in this mortgage, which was superior to the interest of the heirs in the land. This mortgage amounted to \$1,200 when the interest of the heirs in the land was determined, and when the defendant Streit settled with these four heirs under the decree of the court he paid them \$1,500 for their interest, which was, as we have said, subject to the \$1,200 mortgage. On the theory that the value of their interest at that time was \$2,700, this payment of \$1,500 was the amount the heirs were entitled to. As we have said, it is difficult to tell the precise value of the interest of these heirs at that time, and we are not referred to any evidence in the record which tends to show that this was an unfair settlement. Defendant, then, was compelled to release the mortgage to which he was subrogated and pay \$1,500 to perfect his title. His damage, because of failure of his title was \$1,500 and unavoidable expenses which, together with the \$1,500, amounted to more than the note and mortgage in suit. The trial court correctly canceled the note and mortgage.

The judgment of the district court, therefore, canceling the mortgage sued upon and quieting Streit's title to the land is sustained by the evidence, and is

AFFIRMED.

LETTON and FAWCETT, JJ., not sitting.

ALLAIRE, WOODWARD & COMPANY, APPELLANT, v. PERFECTION REMEDY COMPANY ET AL., APPELLEES.

FILED DECEMBER 29, 1916. No. 18887.

Judgment: CONCLUSIVENESS. A cause of action, once fully determined between the parties on the merits, cannot afterwards, so long as such judgment remains in force, be litigated by new proceedings, either before the same or another tribunal.

APPEAL from the district court for Knox county:
ANSON A. WELCH, JUDGE. *Affirmed.*

W. A. Meserve, for appellant.

W. D. Funk, contra.

HAMER, J. .

Appeal from Knox county. The plaintiff and appellant brought suit against the Perfection Remedy Company, a partnership, and the members of the partnership, alleging the execution and delivery by the defendant company of an order for certain goods, wares and merchandise; that the goods described in the written order were manufactured expressly for the defendant, upon the receipt of the order; that the goods were made ready for shipment to the defendant within a reasonable time from the receipt of the order; that the defendant was notified by plaintiff that said order had been filled, and that the plaintiff was ready to ship the same, but that the defendant refused to accept and receive said goods. Judgment was prayed for \$342.50, with interest thereon at 7 per cent. per annum from September 15, 1909.

The defendant in its answer pleaded a prior adjudication, alleging that all of the same matters and things in controversy in this action were actually and fully determined in a former suit had in the county court of Knox county, in the state of Nebraska, on the 20th day of September, 1911, wherein the same party was plaintiff, and the same parties were defendants, which judgment has never been appealed from, and remains in full force and effect. A certified copy of the proceedings in the trial of the case in the county court was made a part of the answer. The plaintiff demurred to the answer. This demurrer was overruled. It elected to stand upon its demurrer, and has appealed from the judgment rendered against it.

The plaintiff contends that the adjudication in the county court is not a bar to its claim, for the reason that the purpose of the petition in the county court was to recover for a sale of the goods, while the purpose of this action is to recover for a breach of the contract

in refusing to accept the goods. It is the theory of the plaintiff that there might be one suit to recover for a sale of the goods, and then another suit to recover for a breach of the contract in refusing to accept the goods, and that one suit would not be a bar to the other, although judgment might be rendered in the first suit. It is not necessary to consider what the law is with respect to this contention—that is, whether an adjudication in favor of the defendant in an action for the purchase price of the goods would constitute a bar to an action for damages in refusing to accept them—for the reason that the pleadings in the action brought in the county court show that that action, as well as the instant case, was brought upon the refusal of the defendant to accept the goods. It was alleged in the petition while in the county court: “4. That the plaintiff has duly performed all the conditions of said contract on his part to be performed and has tendered said goods to the defendants and demanded payment for the same, which was refused.” This is in substance the allegation made in the petition in the instant case. The action brought here is quite plainly the same action which went to judgment in the county court. Whenever this condition appears, there must be an end to the litigation. As said by Mr. Herman in his work on Law of Estoppel and Res Judicata, sec. 108: “The finality and inviolability of judgments of a court of competent jurisdiction, not assailed on error or appeal, rests on an inflexible and conservative principle of law. The judgment between the same parties or their privies is conclusive of the matter directly in question. It is beyond question; it is final and absolute, however erroneous, or whatever of injustice it may work; it is a conclusive determination of the particular controversy. And in this there is no difference between a verdict and judgment in a court of common law and a decree of a court of equity. Both stand on the same footing. The rule has found its way into every system of jurisprudence, not only from its

obvious fitness and propriety, but because, without it, an end could never be put to litigation."

In *Bement v. Smith*, 15 Wend. (N. Y.) 493, the plaintiff built a sulky for the defendant, according to an agreement, tendered it to him, and, on his refusal to accept it, deposited it with a third person on his account, giving the defendant notice of the deposit, and brought an action of assumpsit. It was held that the plaintiff was entitled to recover the contract price. We think that in all cases where it is held that the contract price may be recovered, it will be found that the article sold was completed and ready for delivery and a tender made. "The true rule is that where everything has been done by the vendor which he is required by his contract to do, and the manufactured property in its completed condition is tendered to the purchaser, and he refuses to receive it, and it is held by the vendor for the purchaser, then the vendor may recover the contract price." *Moline Scale Co. v. Beed*, 52 Ia. 307.

Plaintiff could elect to sell the goods manufactured or specially prepared for defendant's use on defendant's formula, under the order, and, after tender made, sue for the contract price. *Funke v. Allen*, 54 Neb. 407.

The case once determined on the merits cannot, while the judgment remains in force, be litigated by new proceedings either before the same or any other tribunal. *Trainor v. Maverick Loan & Trust Co.*, 92 Neb. 821.

"A judgment on the merits constitutes an absolute bar to a subsequent action founded upon the same claim." *Triska v. Miller*, 86 Neb. 503.

"The doctrine of *res judicata* is that a question once determined by a judgment on the merits is forever settled, so far as the litigants and those in privity with them are concerned." *Herpolsheimer v. Acme Harvester Co.*, 83 Neb 53.

"A cause of action, once fully determined between the parties on the merits, cannot afterwards, so long as such judgment remains in force, be litigated by new proceed-

Taylor v. Keneston.

ings, either before the same or any other tribunal." *Yates v. Jones Nat. Bank*, 74 Neb. 734.

The judgment of the district court is right, and it is
AFFIRMED.

SEDGWICK, J., concurs in the conclusion.

FRED A. TAYLOR, APPELLEE, v. OVANDO KENESTON, APPELLANT.

FILED DECEMBER 29, 1916. No. 19037.

Appeal: CONFLICTING EVIDENCE. The jury are the judges of the credibility of witnesses who testify before them and of the weight of their testimony, when properly admitted, and, where there is a conflict of evidence, their verdict will not be set aside unless it is clearly wrong.

APPEAL from the district court for Boyd county:
ROBERT R. DICKSON, JUDGE. *Affirmed.*

W. T. Wills, for appellant.

D. A. Harrington, contra.

HAMER, J.

This case comes from Boyd county on appeal. The plaintiff was injured by being run over by an automobile driven by the defendant, and brought suit to recover damages for his injury. He recovered a judgment of \$238.60. The injury occurred as the parties were leaving the fair grounds at the town of Butte, where they had been watching a ball game and horse race. There was a trial in the district court before Judge Robert R. Dickson and a jury. It is argued by the appellant that the evidence is insufficient to sustain the verdict. It is claimed by the plaintiff that, as he was leaving the fair grounds, he thought that the defendant negligently failed to give any warning of his approach

Taylor v. Keneston.

in his automobile, and that he was driving at a high rate of speed, and that he neglected to use his brakes, and that he ran his automobile over the plaintiff.

The evidence is conflicting. The defendant and his wife, who was with him, testified that when they were leaving the fair grounds they observed the plaintiff walking in the road a short distance ahead of them; that they were driving at a very low rate of speed, not exceeding four or five miles an hour; that the defendant, as the car approached the plaintiff, gave a warning signal, whereupon the plaintiff left the road and indicated that he knew of the approach of the automobile; that as the automobile approached for the purpose of passing the plaintiff, and while still running at a very slow rate of speed, plaintiff stepped in front of the automobile and was then injured. In many of these particulars the defendant is corroborated by numerous witnesses. Especially is this so as to the rate of speed at which he was proceeding as he approached the plaintiff. There is, however, evidence on the part of the plaintiff to show that no warning of the approach of the car was given; that the automobile was being driven at from 12 to 15 miles an hour, a rate of speed which under the circumstances, and in view of the crowded condition of the grounds and number of people using the road at the point where the injury occurred, might be held by the jury to be a dangerous and negligent rate of speed. This testimony is corroborated, because it is shown that the automobile ran a considerable distance after it struck the plaintiff and passed over his body. It is also in testimony that the defendant tried to stop the automobile and was unable to do so. Lloyd Carmichael and three young men or boys were in a buggy two or three rods north of the fair grounds gate. Carmichael testified to seeing the car strike the plaintiff; that the car struck the plaintiff just as he was coming through the gate and carried him along or pushed him about two rods, when he fell down head first "in front of the car," and that

Taylor v. Keneston.

the car "went on over him, and he was lying there in the road." Carmichael also testified that it was about 30 feet or a little more from where the car struck him to where he was lying; that it was about 150 feet from where the car struck him to where the car stopped. Carmichael's testimony seems to be fully corroborated by other witnesses, some of whom appeared for the defense. There is, however, evidence tending to show that the defendant tried to get the plaintiff to step out of the road, and that the plaintiff did so, and then stepped back in again. The defendant's wife testified: "Well, we—I think we were in about 12 feet of Taylor when I first seen him. He stepped down into the road, and I gave a yell and said, 'Get back!' and he stepped right back up out of the road and looked right at us. * * *

Q. And now, after he did that, go on and tell the jury what he did then. A. Then he stepped right back into the road. I don't think he was more than three feet from the front of the car. He went kind of angling then that way. He hadn't any more than struck the center of the road until the car was shoving him."

The defendant strenuously contends that the plaintiff was in fault, and that his injury was due to the fact that he stepped in front of the automobile. In view of the facts as they appear from the evidence, we cannot very well determine that the verdict is without support. In *Fitzgerald v. Union Stock Yards Co.*, 89 Neb. 394, this court said, as stated in the syllabus: "If the evidence is substantially conflicting upon a material issue, it presents a question for the jury." In *Oleson v. Oleson*, 90 Neb. 738, it was said in the syllabus: "All material questions of facts are for the consideration of the triers of fact; if in a trial by jury, the jury must determine them." In *Lukehart v. State*, 91 Neb. 220, it is said in the syllabus: "Questions of fact on conflicting testimony are for the solution of the trial jury." In *Dore v. Omaha & C. B. Street R. Co.*, 97 Neb. 250, it is said in the syllabus: "The jury are the judges of the credibility of

Taylor v. Keneston.

witnesses who testify before them and of the weight of their testimony, when properly admitted, and, unless the decision of the jury thereon is clearly wrong, their verdict will not be molested."

In view of the well-known rule which makes the jury triers of fact and puts upon them the responsibility of determining the controversy, we are unable to disturb the verdict.

The judgment of the district court is

AFFIRMED.

SEDGWICK, J., not sitting.

CASES DETERMINED
IN THE
SUPREME COURT OF NEBRASKA

JANUARY TERM, 1917.

MAUDE M. HENDERSON, ADMINISTRATRIX, APPELLEE, v.
UNION PACIFIC RAILROAD COMPANY, APPELLANT.

FILED JANUARY 3, 1917. No. 19047.

1. **Master and Servant: INJURY TO SERVANT: DEFECTIVE APPLIANCES: ASSUMPTION OF RISKS.** A workman has the right to assume that his employer has used due diligence to provide suitable appliances in the operation of its business. Ordinarily, he does not assume the risk of the employer's negligence in performing such duties. If, however, the defect is known to the employee or is so patent and obvious as to be readily observed by him, and he continues to use the defective appliance with full knowledge and without objection, he assumes the risk of injury incident to such a situation.
2. ———: ———: **QUESTION FOR JURY.** At the time the platform to certain stock-yards at a station on defendant's line was built, sufficient clearance was left between it and the side of an ordinary box car so that a brakeman riding on the ladder at the side of such a car could pass; afterwards a wider model of car was put in use, whereby only eight inches of space was left between the side of the car and the platform. *Held*, that it was for the jury to determine whether the lack of space caused by the increased width of the car left a reasonably safe place for a brakeman to work.
3. ———: ———: ———. The question whether the employee had such knowledge of the defective appliance that he assumed the risk of injury from the same is, if properly pleaded, a question for the jury.

APPEAL from the district court for Douglas county:
CHARLES LESLIE, JUDGE. *Affirmed*.

Edson Rich, A. G. Ellick and B. W. Scandrett, for appellant.

Mahoney & Kennedy and Philip E. Horan, contra.

LEITON, J.

On September 15, 1913, the plaintiff's intestate, Edward C. Henderson, was a brakeman on a local freight train of defendant running from Columbus, Nebraska, to Council Bluffs, Iowa. At Elkhorn, Nebraska, it became necessary to place a coal car loaded with sand at a point west of the station in order to be unloaded. In so doing the engine, a Rock Island box car of ordinary width and Union Pacific coal car No. 11088 were backed by the engine in and upon a side track known as the house track. The yards for loading stock were situated contiguous to and on the south side of this track. The method used in switching was to back the engine quite rapidly, and, while running, a signal was given to the engineer, the engine was stopped, the coal car uncoupled and carried by its own momentum to the point where it was desired to place it. The operation is generally known as "kicking in." It is necessary for the coupling pin to be pulled while the cars were in motion. For this purpose Henderson, when last seen alive, was riding with his foot in a stirrup which projected below the ladder on the side of the coal car, holding to a round or handhold on the side of the car with his left hand, stooping over, and with his right hand upon the lever with which to raise the pin. He was riding on the engineer's side so as to give signals. As the train backed at a speed of about 12 miles an hour, the circumstances clearly indicate that he was struck by the projecting platform of the stock-yards and knocked from the car. His foot was cut off and he was dragged by the engine about 40 or 50 feet and killed. The distance from the outside edge of the rail to the edge of the platform was three feet. The distance from the edge of the rail to the

Henderson v. Union P. R. Co.

outside of the coal car upon which Henderson was riding was two feet four inches, leaving only eight inches between the platform and the side of the car. An ordinary box car is quite a little narrower, but the exact width is not in evidence. Henderson had been on this run between three and four months, but he had worked for the defendant on a train which ran twice a week, and which transported live stock between Grand Island and other Nebraska points and Council Bluffs, for some years previous to being placed upon the local freight. The wide coal cars had only been used by defendant for about four or five years before the accident, but now practically all the coal and sand hauled over the line is hauled in cars of this class.

The petition alleges negligence in the placing of the cattle chute so close to the track, that the car was of excessive width, and that the train was operated at a negligently high rate of speed. The answer denies that the death occurred in the manner alleged in the petition on account of any negligence or carelessness on the part of the defendant, and further alleges that the death of Henderson was "due to causes to which his own carelessness and negligence proximately contributed, and resulted from dangers and risks which were incident to his employment, and open, apparent, obvious and known to the said Edward C. Henderson at the time of said injuries, and which were assumed by him." The jury returned a verdict for \$11,000, for which amount judgment was rendered.

The stock yards were erected at a time prior to the use of the wider coal cars. At the time the platform was erected it was probably reasonably safe and the company had fulfilled its whole duty, but by the subsequent use of the wider cars the distance between the car and the platform was lessened and the danger greatly increased. Accidents owing to the use of wider or higher cars than were usual when permanent structures near the track were built have occurred before. In one

case a brakeman riding upon a furniture car was missed from the train after passing a station where the iron spout to a water tank projected, and the circumstances showed that he had been struck by the overhanging spout, which would not clear a car higher than the average car by the height of a man above the roof of the car. *Choctaw, O. & G. R. Co. v. McDade*, 112 Fed. 888, affirmed 191 U. S. 64. Other cases are *Chesapeake & O. R. Co. v. Cowley*, 166 Fed. 283; *Keist v. Chicago G. W. R. Co.*, 110 Ia. 32; *Harvey v. Texas & P. R. Co.*, 166 Fed. 385, and cases cited in opinion.

In *Texas & P. R. Co. v. Swearingen*, 196 U. S. 51, the side of a scale box erected near the track was shown by the evidence to be only 9½ inches from a ladder on the side of a car moving upon the track. A brakeman was riding on a box car with his foot in the stirrup under the ladder and was looking backwards for a signal from the yardmaster, as it was his duty to do. His shoulder struck the scale box and he was knocked down and severely injured. He was riding on the north side of the car so as to signal the engineer. The evidence in that case was much the same as in this. It was shown that the customary position of a switchman while riding on a car ladder is to swing out from the car with his body, and that a well-developed man could not pass the scale box on the ladder. The plaintiff admitted that he knew of the nearness of the scale box, but said he was not thinking about it. It was contended in that case that the jury should have been instructed to find for the defendant for the reasons that the scale box was erected at a reasonably safe distance from the track, that the plaintiff knew of its location with reference to the track, that the danger was open and obvious and he assumed the risk thereof. It was said in the opinion by Mr. Justice White: "*Prima facie*, the location of scales where the tracks were only the standard distance apart, and where a space of less than two feet was left for the movements of a switchman between the side of a freight

Henderson v. Union P. R. Co.

car and the scale box, incumbered, as he would be in the nighttime, with a lantern employed for the purpose of signaling, did not incontestably establish the performance by the defendant company of the duty imposed upon it to use due care to provide a reasonably safe place for the use of the switchmen in its employ." It has also been said: "It is undoubtedly true that many duties required of employees in the transaction of the business to be carried on by a railroad company are necessarily attended with danger, and can only be prosecuted by means which are hazardous and dangerous to those who see fit to enter into such employment. Where no necessity exists, as in the present case, for the use of dangerous appliances, and where it is a matter requiring only due skill and care to make the appliances safe, there is no reason why an employee should be subjected to dangers wholly unnecessary to the proper operation of the business of the employer. *Kelleher v. Milwaukee & N. R. Co.*, 80 Wis. 584; *Georgia P. R. Co. v. Davis*, 92 Ala. 300; 1 *Shearman & Redfield Negligence* (5th ed.) sec. 201, and cases cited." *Choctaw, O. & G. R. Co. v. McDade*, 191 U. S. 64. See, also, *Kreigh v. Westinghouse, Church, Kerr & Co.*, 214 U. S. 249.

Defendant insists that the evidence shows that the deceased, from having been employed on the stock pickup and afterwards upon the local train, must have been sufficiently familiar with the situation of the platform so that he assumed the risk. We think there is not sufficient proof that Henderson knew of the dangerous condition, or that it was so patent and obvious that he would be charged with notice of it. This being the case, the question was for the jury, and was properly submitted by the instructions of the court. The defense of contributory negligence is not sustained by the evidence if Henderson was not aware of the dangerous proximity of the platform, as the jury must have found.

Complaint is made that the verdict is excessive. It is shown that for nearly two years Henderson had no regular

Roper v. Milbourn.

run, but was a member of what is known in railroad parlance as the "chain gang," i. e., train crews that are called in rotation. In June, 1913, he was assigned to a regular run upon the local freight train, and his wages were thus increased. After this change he received an average of about \$107 a month. He was 38 years of age. His life expectancy was 29.62 years, and his wife's was greater. He used for his own expenses and clothing about \$25 or \$30 a month. He delivered to his wife the remainder of his salary each month for the support of his wife and child. The verdict of \$11,000, under these circumstances, is not excessive.

The case seems to have been fairly submitted to the jury, and the judgment of the district court is

AFFIRMED.

R. C. ROPER, APPELLEE, v. A. L. MILBOURN, APPELLANT.

FILED JANUARY 15, 1917. No. 19851.

Appeal: LAW OF THE CASE. When on the review of a law action this court finds that the evidence in support of plaintiff's cause of action is overwhelming, but remands the case generally for a retrial because of errors in the record, and on a retrial substantially the same evidence, on the question formerly reviewed, is offered by the respective parties, it is not error for the trial court to direct the jury to find for the plaintiff on that issue.

APPEAL from the district court for Dawson county:
HANSON M. GRIMES, JUDGE. *Affirmed.*

H. M. Sinclair, W. A. Stewart and T. F. Hamer, for appellant.

W. D. Oldham, G. C. Gillan and R. C. Roper, contra.

MORRISSEY, C. J.

This is the third appeal from the district court for Dawson county. The first opinion is found in 93 Neb.

Roper v. Milbourn.

809, and the second in 98 Neb. 466. The facts are sufficiently stated in the former opinions. In the opinion in 98 Neb. 466, it was said that by the overwhelming weight of the evidence it was shown "that defendant, when he agreed to buy the land, contemplated with plaintiff the profits of the resale, knowing the price at which Naslund had sold the land." The verdict was set aside and the cause remanded. On motion being filed to modify the judgment, the following order was made: "The judgment does not determine questions of fact except for the purpose of the decision, reversal of the judgment being generally for a retrial of all questions of fact." On a retrial the court took all questions from the jury except the amount of recovery, and its action in this regard is the main issue presented.

Appellant insists that the jury ought to have been left to determine whether the parties at the time the contract was made had contemplated the profits of the resale, as well as the value of the land lying north of the track. This question was in fact tried out. Each party submitted substantially the same evidence as that offered on the former trial, and, so far as that issue is concerned, the record stands in the same condition as it did when this court said that the evidence was overwhelming in behalf of the plaintiff. After making a re-examination of the evidence, we find no reason for changing the former holding. It would serve no useful purpose to set out the testimony. The evidence being "overwhelming" on that branch of the case, a verdict for the defendant could not be permitted to stand.

"A trial court should not instruct a jury to return a verdict for either party where, under the evidence, there is any doubt about the propriety of such action; but where the duty to do so is plain it should be performed without hesitation." *U. P. Steam Baking Co. v. Omaha Street R. Co.*, 4 Neb. (Unof.) 396.

"On a former appeal from a judgment in favor of the plaintiff, the case was reversed on the ground that the

Palmer v. Palmer.

verdict was not sustained by the evidence. On a second trial of the case, the evidence offered by the plaintiff was substantially the same as on the first trial, the plaintiff failing to adduce any new material testimony. The trial court directed a verdict for the defendant. *Held*, no error." *Anderson v. Union Stock Yards Co.*, 84 Neb. 305.

"Where the evidence is insufficient to sustain a verdict in favor of plaintiff, it is error for the trial court to overrule a motion for a peremptory instruction in favor of defendant." *Ward v. Aetna Life Ins. Co.*, 91 Neb. 52.

The evidence on this trial being substantially the same as that on the former trial, and this court having previously held that under that evidence defendant's liability was conclusively shown, the trial court would not have been warranted in submitting that question to the jury. Under proper instruction the court submitted the only remaining question of fact to be determined.

The verdict of the jury is amply sustained by the evidence, and the judgment is

AFFIRMED.

HAMER, J., not sitting.

HENRY W. S. PALMER, APPELLANT, v. MARY J. PALMER,
APPELLEE.

FILED JANUARY 15, 1917. No. 18925.

Fraudulent Conveyances: RELIEF IN EQUITY. He who seeks equity must come into court with clean hands, and where a conveyance of land was made without consideration in order to defeat a judgment in an anticipated suit for divorce and alimony, a court of equity will not lend its aid to the fraudulent grantor to set aside the conveyance, but will leave the parties as it finds them.

APPEAL from the district court for Dundy county:
ERNEST B. PERRY, JUDGE. *Affirmed.*

Palmer v. Palmer.

W. C. Dorsey and David G. Hines, for appellant.

J. L. Rice and W. S. Morlan, *contra*.

LETTON, J.

This action was brought to set aside a conveyance of 320 acres of land made by the plaintiff to his mother, Mary J. Palmer. The district court found that 160 acres of the land was the family homestead of plaintiff, at the time it was conveyed; that his wife did not join in the deed, and the conveyance was therefore void. As to the other tract, the court found generally for the defendant. From a decree based on these findings, plaintiff appeals.

Summarized, the petition alleges that shortly before September, 1902, the plaintiff's wife deserted him without just cause, and that, while he was prostrated both physically and mentally on account of her conduct, his mother solicited and advised him to convey to her the 320 acres of land, stating that, unless such a conveyance were made, the plaintiff's wife might deprive him of all his property and leave him and his minor children destitute; that he yielded to his mother's influence, and, relying on her statements and promises, he made a conveyance of the land to her without any consideration, and intended only to vest the title in her as trustee for himself, and upon her express promise to reconvey to him on his demand; that the land was then worth \$4,500; that no consideration was paid; that he has ever since been the owner of the land, paying taxes, and keeping up the improvements, and has been in the open, notorious, exclusive and adverse possession of the premises for more than ten years last past. He pleads the homestead character of 160 acres; that the conveyance constitutes a cloud upon his title; and prays for relief.

In substance, the answer alleges that at the time the conveyance was made the plaintiff intended to obtain a divorce from his wife and deprive her of all interest in his property; that he feared that his wife would file

Palmer v. Palmer.

a cross-petition asking for alimony and would obtain a judgment; that he had been guilty of cattle stealing and feared that a judgment would be rendered against him by the owners of the cattle he had stolen; that he was without money, and, in order to hinder, delay and defraud his wife and the owners of the cattle and to obtain funds for use in the divorce suit and criminal prosecution, he induced his father, who is now deceased, to purchase the land, the consideration being that his father should cancel about \$500 indebtedness and pay about \$2,500 more, and that plaintiff should convey the land to whomsoever his father should direct; that his father was indebted to defendant, and in payment of the same directed a conveyance to be made to her. It pleads the payment of a consideration to plaintiff, the abandonment of the homestead, the expenditure of money upon improvements on the lands, and that defendant had been in the exclusive and adverse possession of the land ever since the execution of the deed. The reply denies the new matter in the answer, and pleads the payment of a judgment for alimony.

We are satisfied the evidence does not sustain the defense of a purchase by the father and conveyance to the mother by his direction in payment of a debt. It is clear that one tract was the homestead, and that the attempted conveyance of this was void since the wife did not join in it.

Shortly after the conveyance was made the plaintiff was taken to Lincoln and confined in the Nebraska penitentiary upon a charge of cattle stealing. He was released upon parole, when he returned to Dundy county and remained there until this suit was begun. His father's lands, those belonging to him, and other lands were inclosed with a fence constituting the home ranch. The plaintiff worked with his father upon the ranch until the latter's death in 1907, and since that time until about a year before the beginning of the suit he seemed to have conducted the business of the ranch, with or for his

Palmer v. Palmer.

mother, signing checks in her name, selling cattle, and acting as business manager generally. Apparently no attempt was ever made to dispossess him of the premises, and, so far as the record shows, since his father's death he has been in receipt of the income from the property, but it was treated as the income from the other ranch property was.

We are satisfied from the evidence that the original intention of all the parties at the time the deed was made was that the land should be conveyed in order to put it out of the reach of the wife of plaintiff in case she should file a cross-petition for divorce, and that the district court was right in holding that the plaintiff does not come into a court of equity with clean hands. But it is shown that after his father's death plaintiff released and conveyed all his interest in his father's estate to his mother, the defendant in this case, and there is proof that the land was considered and spoken of by defendant as "Will's land." There was no adverse possession by either party.

From a consideration of the evidence, we have arrived at the same conclusion as did the district court. The action is not a possessory one, but is merely to quiet title. The possession of the land seems to be in the plaintiff, and while the judgment in this action does not remove the cloud from the title to 160 acres of the land, on the other hand it does not give the defendant any right to possession. In such a case a court of equity will not lend its aid to either party, but will leave matters as it finds them.

The judgment of the district court is therefore

AFFIRMED.

State, ex rel. Rohrs, v. Harris.

STATE, EX REL. FRED H. ROHRS, APPELLEE, v. A. N. HARRIS ET AL., APPELLANTS.

FILED JANUARY 15, 1917. No. 19868.

Counties and County Officers: DEPUTIES: APPOINTMENT. The act requiring the county commissioners to "furnish the sheriff with such deputies as they shall deem necessary" and to "fix the compensation of such deputies" does not repeal by implication the former enactment conferring upon the sheriff the power to appoint deputies, the statutes as they now exist requiring the county board to determine the number of deputies and to fix their compensation and authorizing the sheriff to make the appointments. Rev. St. 1913, secs. 2443, 5735.

APPEAL from the district court for Nemaha county:
JOHN B. RAPER, JUDGE. *Affirmed.*

H. A. Lambert and Fred G. Hawxby, for appellants.

Kelligar & Ferneau and R. F. Neal, contra.

ROSE, J.

Relator applied to the court below for a writ of mandamus to compel respondents as county commissioners of Nemaha county to approve his bond as deputy sheriff. The county board had made an order allowing the sheriff a deputy at a salary of \$1,000 a year. There being a vacancy in the office of deputy, the sheriff filled it by the appointment of relator, who tendered a bond which the county board declined to approve, on the ground that the legislature had taken from the sheriff the appointing power. An alternative writ was issued, and the trial court overruled a demurrer thereto. Respondents refused to plead further, and from an order allowing a peremptory writ they have appealed.

The authority of the sheriff to make the appointment is the question presented. Relator relies upon the following statutory provisions:

"The state auditor, treasurer and librarian respectively, and each county register of deeds, treasurer, sheriff,

State, ex rel. Rohrs, v. Harris.

clerk and surveyor, may appoint a deputy, for whose acts he shall be responsible and from whom he shall require a bond, which appointment shall be in writing, and shall be revocable by writing under the principal's hand." Rev. St. 1913, sec. 5735.

"The sheriff may appoint such number of deputies as he sees fit." Rev. St. 1913, sec. 5738.

Respondents contend that the provisions conferring upon the sheriff the appointing power were by implication repealed by a later act entitled, "An act fixing the salaries of sheriff and the manner of appointing and paying their deputies." Laws 1907, ch. 54.

Respondents rely upon the following section: "The board of county commissioners or supervisors shall furnish the sheriff with such deputies as they shall deem necessary and shall fix the compensation of such deputies who shall be paid by warrant drawn on the general fund." Laws 1907, ch. 54, sec. 2.

Unless the enactment quoted repeals by implication the former provisions empowering the sheriffs to appoint their own deputies, the position of respondents is untenable. The law relating to repeals by implication has been stated as follows:

"A statute will not be considered repealed by implication unless the repugnancy between the new provision and the former statute is plain and unavoidable." *Lawson v. Gibson*, 18 Neb. 137. *Albert v. Twohig*, 35 Neb. 563; *Beatrice Paper Co. v. Beloit Iron Works*, 46 Neb. 900; *Dawson County v. Clark*, 58 Neb. 756; *City of Central City v. Marquis*, 75 Neb. 233.

"Repeals by implication are not favored, and a construction of a statute which, in effect, repeals another statute will not be adopted, unless such construction is made necessary by the evident intent of the legislature." *Schafer v. Schafer*, 71 Neb. 708.

"Statutes *in pari materia* should be construed together, and their provisions harmonized, if possible." *State v. Dunn*, 76 Neb. 155.

State v. Stanton County.

The provision that "the sheriff may appoint such number of deputies as he sees fit" is, of course, repugnant to, and inconsistent with, the later enactment conferring upon the county commissioners power to "furnish the sheriff with such deputies as they shall deem necessary," but a reasonable construction may harmonize the other legislation relating to deputies as it appears in the two acts. Respondents take a different view, however, and argue that the later provision, requiring the county commissioners to "furnish the sheriff with such deputies as they shall deem necessary," when considered with the title referring to the "manner of appointing" deputies, confers the appointing power upon the county board. The subject as expressed in the title may be broader than the enactment. In the body of the act itself the word "furnish" is used. The legislature of 1907 did not insert a repealing clause, and evidently intended to authorize the county's administrative body to determine the number of deputies needed and to fix the compensation, leaving the appointment to the sheriff, according to the terms of the former act. The word "furnish" is properly used in that sense. The action of the board in determining the number of deputies necessary and in fixing the salary is consistent with the sheriff's appointing power. In this view of the law the writ was properly allowed.

AFFIRMED.

STATE OF NEBRASKA, PLAINTIFF, v. STANTON COUNTY,
DEFENDANT.

FILED JANUARY 15, 1917. No. 18902.

1. **Decision Adhered to.** The decision in *State v. Douglas County*, 18 Neb. 601, holding that sections 46, 47, ch. 31, Gen. St. 1873 (Ann. St. 1911, secs. 10094, 10095) are valid, is adhered to.

State v. Stanton County.

2. **Limitation of Actions: ACTION BY STATE: STATE FUNDS.** Money levied and collected by county authorities under those sections, and transferred to the general fund of the county, belongs to the state and is a part of the revenue of the state within the meaning of section 7581, Rev. St. 1913. The statute of limitations does not apply to an action to recover the same from the county.
3. **States: PUBLIC FUNDS: APPROPRIATIONS: CONSTITUTIONAL PROVISIONS.** Those sections of the statute do not constitute appropriations of the public money within the meaning of the constitutional provisions in regard to appropriating the money of the state.
4. **Insane Persons: CLAIM AGAINST COUNTY.** The trustees are by those sections required to fix the amount to be paid by each county for "board and care" of patients domiciled in such counties, respectively, by computation of the "sum actually paid" by the state. When no question is raised as to whether the amount so determined is accurate and right, it is not necessary to determine what remedy, if any, exists for correcting the amounts so charged.
5. ———: ———: **ACTION.** It is not necessary to present the state's claim for such money to the county board of the delinquent county under section 5638, Rev. St. 1913, before bringing action to recover the same. Such action is not based upon an account or claim against the county within the meaning of that section.
6. ———: ———: **INTEREST.** The county is properly charged with interest upon money so collected and wrongfully withheld by the county.

Action to recover for care of insane persons. Case referred, with report that plaintiff recover, and defendant excepts. *Exceptions overruled, report confirmed, and judgment entered.*

Willis E. Reed, Attorney General, and George W. Ayres, for plaintiff.

T. J. Doyle and Virgil L. Horton, contra.

SEDGWICK, J.

This action was begun in this court to recover from Stanton county for the board and care of patients committed to the state hospital for the insane from said county, under sections 10094, 10095, Ann. St. 1911. The case was referred to J. H. Broady, Esquire, as referee to report his findings of fact and conclusions of law. The

State v. Stanton County.

referee reported that the state ought to recover \$2,214.65, with interest thereon to the date of the report, April 7, 1916, amounting altogether to \$5,448.96. The defendant filed exceptions to the report and argument was duly had thereon.

The first contention is that the statute is unconstitutional and void. The sections referred to are as follows: "Section 10094. The board of trustees shall from time to time fix the sum to be paid per week for the board and care of patients, and to arrive at such sum shall estimate the total outlay as far as possible from the sums actually paid per annum; and the weekly sum so fixed shall be the sum said hospital shall be entitled to demand for the keeping of any patient, and the certificate of the superintendent, attested by the seal of the hospital, shall be evidence in all places, as the amount due as fixed.

"Section 10095. The superintendent shall certify to the auditor of state on the first days of March, June, September, and December the amount (not previously certified by him) due to said hospital from the several counties having patients chargeable thereto, and said auditor shall pass the same to the credit of the hospital. The auditor shall thereupon notify the county clerk of each county so owing, of the amount thereof, and charge the same to said county, and the board of county commissioners shall add such amount to the next state tax to be levied in said county, and pay the amount so levied into the state treasury."

The question of the constitutionality of this statute was involved in the early case of *State v. Douglas County*, 18 Neb. 601, and was discussed quite at large both in the majority opinion, in which it was held that the statute was constitutional, and in the dissenting opinion. This case was cited in a later case in which it was said: "There was filed in that case a dissenting opinion by Chief Justice Maxwell, so that the propositions therein discussed cannot as yet be recognized as

State v. Stanton County.

settled beyond question; indeed, having regard simply to the weight of argument, we believe the views of the chief justice should have prevailed." *Baldwin v. Douglas County*, 37 Neb. 283. It is now strenuously insisted that, as the opinion in *State v. Douglas County* was not unanimous, and in view of the later criticism, that decision should be overruled and the statutes held to be unconstitutional. This argument is based largely upon the proposition that the Constitution forbids double taxation. It appears that the state has continually levied taxes sufficient to support the state hospital for the insane and pay all its expenses. The citizens of Stanton county paid their just proportion of the taxes so levied, and to now levy a county tax upon the citizens of that county to be paid to the state for the same purpose, it is contended, is double taxation upon that county. This argument is presented at large by Chief Justice Maxwell in his dissenting opinion in *State v. Douglas County, supra*. The evidence shows that the supervisors of the county of Stanton levied taxes from year to year under this statute; that some of the taxes so levied were remitted to the state treasury pursuant to the statute, and other taxes so levied in various years were retained in the county insane fund until a sufficient amount had accumulated with which to pay this claim of the state, and was afterwards by order of the county board transferred from the county insane fund to the county general fund. It seems very doubtful, to say the least, whether the county, after having levied these taxes under this statute with which to reimburse the state as the statute provides, could, after the money was collected and in the county treasury, for the purpose of retaining the money in its general fund, assert the unconstitutionality of the statute under which the money had been levied and collected. As the question of the constitutionality of this statute is necessarily involved and is also urged in the case of *State v. Gage County*, p. 753, *post*, which is submitted with this case, and it appears that other counties in the

State v. Stanton County.

state are interested in the same question, we have upon examination concluded that we are not required to overrule the decision in *State v. Douglas County, supra*. Clearly the question whether the state shall by general taxation support and provide for the poor, the insane, and the unfortunate, or this duty shall be devolved upon each county as to the citizens domiciled therein, is a question of public policy to be determined by the legislature.

The statute under consideration appears to determine that question and to devolve that duty upon the respective counties. The state may not levy more taxes than necessary for public purposes. If all the counties of the state had promptly complied with this statute, the necessary state levy for the support of the insane would have been reduced. In such case state levy would be necessary to maintain the institutions and to care for the strangers not domiciled in the state. For these purposes the citizens of each county of the state would be required to contribute their proportion. Many of the counties have complied with this statute. If others now comply with it, necessary state levies for the support of these institutions will be reduced and there will be no necessary inequality of taxation.

It is also urged that the statute of limitations has run against the claim of the state: "Every claim and demand against the state shall be forever barred, unless action be brought thereon within two years after the claim arose. Every claim and demand in behalf of the state, except for revenue, or upon official bonds, or for loans or moneys belonging to the school funds, or loans of school or other trust funds, or to lands or interest in lands thereto belonging, shall be barred by the same lapse of time as is provided by the law in case of like demands between private parties." Rev. St. 1913, sec. 7581. If this demand is to recover revenue of the state, it comes within the exceptions, and the statute of limitations does not apply. "Revenue" is thus defined in

State v. Stanton County.

Webster's New International Dictionary: "The annual or periodical yield of taxes, excise, customs, duties, rents, etc., which a nation, state or municipality collects and receives into the treasury for public use; public income of whatever kind." In *State v. Ewing*, 22 Kan. 708, it is said that the word "revenue" is "broad and general, and includes all public moneys which the state collects and receives, from whatever source and in whatever manner." This definition is approved in *City of Omaha v. Hodgskins*, 70 Neb. 229. In this case, when this money had been collected under this statute, there was a continuing duty on the part of the county to turn the money over to the state, and, as this court said in *City of Chadron v. Dawes County*, 82 Neb. 614; "In such a case, as between the county and city or village, the county does not hold such collections in its own right, but the possession of the one is the possession of the other." In *New Orleans v. Fisher*, 180 U. S. 185, it was said: "As the collections were held in trust, the statute of limitations constituted no defense." In any view of the case the statute of limitations has no application here.

The statute, by requiring each county to pay for the board and care of insane patients who are domiciled in the county, does not make an appropriation of public money, and is not affected by the constitutional provisions in regard to appropriations. When the legislature makes the annual appropriations for the support of the insane, it takes into consideration the payment made by the counties, and should make appropriation only for the probable deficiency.

When the trustees from time to time fix the sum to be paid per week for the board and care of patients, they are required to fix it as the "sum actually paid," that is, the counties shall be charged the actual cost of the "board and care" of the patients which the policy of the statute was to require the counties to provide for. It is not necessary in this case to determine what the

State v. Gage County.

remedy of the taxpayer would be if the amount fixed was excessive, as no such question is presented.

It was not necessary to present this claim to the board of county commissioners. It is not an action in contract; it is not based upon an account or claim against the county within the meaning of section 5638, Rev. St. 1913. The money was collected for and belonged to the state, and was wrongfully withheld by the county. While so wrongfully held the county is properly chargeable with the use of the money, and should pay interest thereon, as found by the referee. It was not withheld by the taxpayers, but by the county itself in its corporate capacity by action of its board of commissioners.

The exceptions to the report of the referee are overruled, the report is confirmed, and judgment entered accordingly. Interest will be added from the date of the report of the referee to the date of this judgment.

JUDGMENT ACCORDINGLY.

STATE OF NEBRASKA, PLAINTIFF, v. GAGE COUNTY, DEFENDANT.

FILED JANUARY 15, 1917. No. 18901.

1. **Decision in Former Case.** The principal questions in this case are determined in the companion case, *State v. Stanton County*, ante, p. 747.
2. **Asylums: STATUTORY PROVISIONS.** The act of 1885 (Laws 1885, ch. 55) for the construction of an asylum for the insane at Norfolk, and the act of 1887 (Laws 1887, ch. 48) providing for an asylum at Hastings, were both enacted in view of the general act of 1873 (Gen. St. 1873, ch. 31), and it was intended that all hospitals for the insane of the state should be governed by the act of 1873 so far as applicable.
3. **Insane Persons: LIABILITY OF COUNTIES: STATUTE.** The provisions of the act of 1873 requiring counties to pay for board and care of insane persons domiciled therein governed the three institutions, when constructed so far as applicable.

State v. Gage County.

Action to recover for care of insane persons. Case referred, with report that plaintiff recover, and defendant excepts. *Exceptions overruled; report confirmed, and judgment entered.*

Willis E. Reed, Attorney General, and George W. Ayres, for plaintiff.

T. J. Doyle and Fred W. Messmore, contra.

SEDGWICK, J.

This case was submitted with *State v. Stanton County*, ante, p. 747, and in the main involves the same questions. The constitutionality of the statute involved is there upheld, and it is determined that the statute of limitations does not apply, that it was not necessary to present this claim to the county board for adjudication, and that the state is entitled to interest on the money withheld by the county.

A part of the claim in this case was for patients cared for in the state hospital for the insane at Hastings. It is contended that sections 10094, 10095, Ann. St. 1911, have no application to such patients. These sections are a part of the act of 1873 (Gen. St. 1873, ch. 31), entitled "Insane." The title of the act is: "An act for the government of the hospital for the insane; defining the legal relations of insane persons, and providing for their care and protection." It is a comprehensive act including 60 sections. The first section provides: "That the hospital for the insane, located at Lincoln, in the county of Lancaster, shall be known under the name and by the title of the 'Nebraska Hospital for the Insane,' and shall be under the charge of three trustees, two of whom shall constitute a quorum for the transaction of business." In 1885 an act was passed entitled "An act to establish, locate, erect and maintain a hospital for the insane within the state of Nebraska, and appropriate the necessary funds therefor." Laws 1885, ch. 55. In that act (section 3) it was provided that regulations

State v. Gage County.

should be adopted "in regard to what patients or class of patients shall be admitted to and provided for in the respective hospitals, or from what portion of the state patients, or certain classes of patients, may be sent to each or either hospital." It was clearly the intention of the legislature to make this new hospital a part of the general provision for caring for the insane of the state. In 1887 the legislature established an asylum for the incurable insane. Laws 1887, ch. 48. It contained no provisions for the government of the institution, nor regulations for the admission or discharge of patients. All matters except the construction of the building were referred to the former acts. These three, then, constituted the provision of the state for the care of the insane, and they were all governed by the general and comprehensive act of 1873 so far as its provisions were applicable. This contention of the defendant cannot be sustained.

A question is raised as to the condition of the accounts of the state, and the statement thereof by the referee. It appears that, exceptions being made to the first report of the referee, that report was by him set aside and a new computation made with a different result. The accounts are somewhat complicated, and we cannot attempt to state here a complete analysis of them. So far as we have observed as to those matters specified in the brief, the referee has reached a right conclusion.

The exceptions to the report of the referee are overruled, the report is approved, and judgment will be entered accordingly. Interest is to be added from the date of the report.

JUDGMENT ACCORDINGLY.

Chittenden v. Kibler.

GEORGE R. CHITTENDEN, APPELLANT, v. CHARLES W. KIBLER, MAYOR, ET AL., APPELLEES.

FILED JANUARY 15, 1917. No. 19725.

1. **Statutes: CONSTITUTIONALITY.** Chapter 86, Laws 1915, is not invalid as a violation of section 4, art. III of the Constitution.
2. **Municipal Corporations: STREET PAVING: IMPROVEMENT DISTRICTS.** Under section 4916, Rev. St. 1913, as amended by chapter 86, Laws 1915, relating to cities of the first class having 5,000 to 25,000 people, the street specified to be paved and the property abutting thereon constitute the paving district. An ordinance specifying the street or part of street to be paved sufficiently describes the proposed paving district.

APPEAL from the district court for Buffalo county:
JAMES R. HANNA, JUDGE. *Affirmed.*

H. M. Sinclair and T. F. Hamer, for appellant.

Warren Pratt, John P. Breen and W. W. Wilson, contra.

Willis E. Reed, Attorney General, and C. E. Abbott, amici curiæ.

SEDGWICK, J.

This is an application for an injunction to restrain the mayor and city council of Kearney from ordering the paving of a street on which plaintiff owns abutting property; it being alleged that the act authorizing the formation of the improvement district is unconstitutional. Laws 1915, ch. 86. From a judgment dismissing the action, plaintiff has appealed.

Plaintiff contends that the act violates the following constitutional provision: "After the expiration of twenty days of the session, no bills nor joint resolutions of the nature of bills shall be introduced, unless the governor shall by special message call the attention of the legislature to the necessity of passing a law on the subject-matter embraced in the message, and the introduction of bills shall be restricted thereto." Const., art. III, sec. 4.

The record shows that on the 5th day of the session of the legislature which convened in 1915, senate file No. 21 was introduced under the following title: "A bill for an act to amend section 5110, Revised Statutes of Nebraska for 1913, relating to paving streets and making assessments therefor, to repeal said original section 5110 and all acts and parts of acts in conflict herewith, and to provide for an emergency." On the 32d day of the session the committee on municipal affairs, to which the bill had been referred, recommended that it be indefinitely postponed, and the report was adopted. On the 33d day the bill was recommitted to the standing committee for amendment, and on the 35th day the committee on municipal affairs recommended that the title of the bill be amended by striking out "section 5110" and inserting "section 4916," the body of the bill also being changed. The act was subsequently passed under the following title: "An act to amend section 4916, Revised Statutes of Nebraska for 1913, relating to paving streets and making assessments therefor, to repeal said original section 4916 and all acts and parts of acts in conflict herewith, and to provide for an emergency." Section 5110 related to paving in cities of the second class and villages, while section 4916 related to paving in cities of the first class having more than 5,000 and less than 25,000 inhabitants. Plaintiff contends that the substituted bill is a new bill introduced after the 20th day of the session.

It is not the province of this court to determine the policy or salutary character of legislation. But there are constitutional limitations upon the power of the legislature that must be observed, and the unpleasant duty is at times devolved upon this court to determine that attempted legislation exceeds those limitations. An act of the legislature, however, will not be held invalid unless it plainly violates the fundamental law of the state or nation.

Chittenden v. Kibler.

The original title of the act as introduced recited that its purpose was to amend a statute "relating to paving streets and making assessments therefor." This title seems to give notice that it is considered that paving in general is a subject of legislation, and that it will be so treated in the consideration of the act. If the title had recited that the proposed legislation related to paving in cities of the second class and villages, it would be a more specific exclusion of paving in cities of a higher class. There seems to be little ground for different proceedings for paving streets and making assessment therefor in towns of 5,000 inhabitants from those required in towns of less than 5,000. As the act was passed with an emergency clause, it may be presumed that paving has been done in many of the cities affected since this act was approved, and much confusion might follow if this legislation is declared invalid. In *State v. Ryan*, 92 Neb. 636, it was held: "Where a bill has been introduced into the legislature within the time limited by the Constitution for the introduction of bills, amendments which are within the general purpose of the bill may be made after that limit has expired." The legislature evidently considered that the recital in the title of the act that it related "to paving streets and making assessments therefor," without limiting it to any class of towns, made that "the general purpose of the bill." We do not feel required to hold that the legislature was wrong in so regarding it.

The ordinance defined the proposed district as follows: "All that part of Twenty-fourth street commencing on the west side of Ninth avenue running thence west to the tailrace." It is contended that this is an insufficient description of the district, and that property owners would be unable to know whether or not their property lies within the district. The statute for cities of this class, prior to the act of 1915, was section 4916, Rev. St. 1913. It was amended in 1915 (chapter 86) and contains the following provisions: "That unless a

Chittenden v. Kibler.

majority of the owners of property abutting on said district shall file written objection to such paving, repaving or macadamizing, the council shall forthwith proceed to construct such paving, repaving or macadamizing." This language shows without uncertainty that the legislative intention was that the street named as the district, together with the property abutting thereon, might constitute the district, and would do so unless otherwise specified in the ordinance. The paving district, therefore, in this case is that part of Twenty-fourth street specified, together with the property abutting thereon.

The judgment of the district court is

AFFIRMED.

ROSE, and CORNISH, JJ., dissent.

HAMEE, J., not sitting.

LETTON, J., concurring.

At the argument of this case the writer raised the question whether he was qualified to participate in the decision as to the constitutionality of the act of 1915, on account of the fact that he is the owner of a small piece of property liable to be assessed in paving proceedings pending in another city of the same class. Both parties agreed in open court that, if his vote became necessary to a determination of the case, the writer should sit. One judge is disqualified under the statute by reason of his son being of counsel in the case. Three judges are of the opinion that the act is valid, while two are of the contrary opinion. Since under section 2, art. VI of the Constitution, no decision can be had of the questions presented without the writer participating, it becomes necessary for him to act.

The question whether the amendment is germane to the subject-matter of the act is a very close one, and is by no means free from doubt. It is the duty of courts not to declare a law unconstitutional unless it is clearly so. Every act comes before the court with the presumption of constitutionality, and if there is any doubt it

Patterson v. Morehead.

should be resolved in favor of the validity of the statute.

Undue strictness and literalness of construction ought not to be resorted to in order to defeat the will of the legislature; and, where there is a substantial doubt as to whether the title of an act is sufficiently broad to include an amendment, the act should not be declared invalid for that reason alone.

Since the case was first argued there has been a change in the personnel of the court. It has been considered here by seven judges other than the writer. Four of these believed the statute valid, and three were of opinion that the amendment was not germane. The district court held the statute to be valid. In this state of the case the doubt should be resolved in favor of the validity of the act. I therefore concur in the opinion.

FRANK A. PATTERSON, APPELLANT, v, JOHN H. MOREHEAD
ET AL., APPELLEES.

FILED JANUARY 15, 1917. No. 19867.

1. **Appeal: PLEADING: DEMURRER.** When a general demurrer is filed to a petition, the court will pass upon the sufficiency of the petition without receiving evidence by affidavit or otherwise, and this court upon appeal from an order sustaining such demurrer will consider only the sufficiency of the petition.
2. **Injunction: PRACTICE OF DENTISTRY: RIGHT TO SUE.** One who had no license to practice dentistry, nor any permit under section 2806, Rev. St. 1913, could not maintain an action in equity to enjoin the state board from interfering with him in attempting to so practice.
3. **Quere.** Whether mandamus will lie in a proper case to compel the state board to grant an application for examination is not decided.

APPEAL from the district court for Sheridan county:
WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

Patterson v. Morehead.

Allen G. Fisher and William P. Rooney, for appellant.

Willis E. Reed, Attorney General, Dexter T. Barrett and Brogan & Raymond, contra.

SEDGWICK, J.

The plaintiff began this action in the district court for Sheridan county against these defendants as the state board of health and the state board of dental secretaries, and asked for an injunction restraining them "from instituting, in person, or by agent, servant, deputy, or employee, and from proceeding by complaint or information or injunction against the plaintiff in any manner for any alleged violation of the statutes of the state of Nebraska relative to the exercise or practice of the dental science," and to restrain the defendants Pierce and Wallace "from exercising in relation to plaintiff any powers, duties, or functions of membership of the board of dental secretaries of the state of Nebraska," and to enjoin the defendant Jackman from canceling an alleged "agreement and dissolving the relation of preceptor to the plaintiff as apprentice." A temporary injunction was allowed substantially as prayed for. The defendants filed answers in the case, and afterwards depositions were taken. Later on the defendants asked leave to withdraw their answers and to file a demurrer. Leave was granted, and a demurrer was filed on the two grounds that "several causes of action are improperly joined," and "the petition does not state facts sufficient to constitute a cause of action." The court sustained the demurrer and dismissed the petition, and the plaintiff has appealed.

The plaintiff's brief does not comply with rule 12 (Supreme Court Rules, 94 Neb. p. XI), but he makes four assignments of error. The first assignment is that the court erred in considering an affidavit filed by one of the defendants when the demurrer was presented. We will not presume that the court did consider anything

Patterson v. Morehead.

but the petition and the demurrer in passing upon the same, and, if the trial court did, this court would not be required to consider such affidavits.

The second assignment is an allegation that "the plaintiff has acted in good faith, and is entitled to continue as apprentice, under our statutes, until examined and licensed to practice." The statute referred to in this assignment is section 2809, Rev. St. 1913. That section was repealed by the act of 1915. Laws 1915, ch. 50, sec. 11. The allegations of the petition do not show a compliance with that statute which would require us to interfere with the discretion of the state board.

The third assignment is: "The fact of advertising in Minnesota is not such bad morals as will deny license upon due examination and showing of qualifications in the state of Nebraska, his present residence." The allegation of this assignment cannot be successfully controverted, but it does not seem to throw any light upon the sufficiency of this petition to state a cause of action.

The fourth assignment of error is: "The statutes of 1915, confiding the appointment of dental examiners or secretaries to the recommendation of the state dental society, is void and unconstitutional." The matters involved in this petition are all prior to the act of 1915. We cannot find from anything suggested in the brief that the sufficiency of this petition to state a cause of action depends in any respect upon the constitutionality of the act of 1915 referred to. The plaintiff is not entitled to a license to practice dentistry in this state without an examination by the proper board as the statute requires.

Whether the board upon proper application could be compelled by mandamus to grant such an examination is not presented by this record. The plaintiff had no temporary permit under section 2806, Rev. St. 1913, and these defendants could not be enjoined from interfering with the plaintiff in attempting to practice dentistry unless and until the plaintiff had been duly licensed as the statute

Patterson v. Morehead.

requires. We do not find in this somewhat lengthy petition an allegation that the plaintiff had been licensed to practice dentistry in this state. This petition cannot be construed as a petition in mandamus to issue such permit or to require the proper authorities to grant the petitioner an examination and to determine his qualifications for a license. The general demurrer to the petition was therefore properly sustained.

The judgment of the district court is

AFFIRMED.

HAMER, J., dissenting.

This is apparently a controversy between dentists. The state board of health and the state board of dental secretaries are necessarily connected with the struggle. The applicant is a Dane who has been in the United States many years, and has been engaged in the work of dentistry at St. Paul, Minnesota, from which state he comes to Nebraska. He has also done dental work elsewhere. If I understand his petition, he has been for more than 14 years engaged in dental work. He has lived by his labor in this capacity. He has a family dependent upon him for support, and he craves the seemingly modest privilege of being an apprentice to one Dr. E. A. Jackman, a competent and licensed practitioner of dentistry at Gordon, Nebraska. It is claimed that there is a rival dentist across the street from Dr. Jackman, and that Dr. Jackman is getting the benefit of the labor of the applicant to the great disadvantage of the dentist across the street. We have nothing directly to do with the controversy between rival dentists, no difference which side of the street they occupy. The applicant shows a certificate of one M. F. Andrews, "Official Examiner for the Ohio State School Commissioner." This certificate certifies his admission to "The Cincinnati College of Dental Surgery, Dental Department, Ohio University." There are also some other exhibits, including the photograph of the applicant. It

shows the face of a courageous and patient man. The state board of health and the state board of dental secretaries filed answers to the plaintiff's petition, and evidence was taken by leave of the court.

In the answer of the state board of dental secretaries it is set forth that a "temporary permit to practice dentistry" was issued to the applicant on or about April 14, 1914; that this "permit granted to plaintiff the right to practice dentistry until the next regular meeting of the dental secretaries;" that at said meeting the applicant would be allowed to present satisfactory evidence of his eligibility "for examination for permanent license to practice dentistry, * * * as required by section 2807, Rev. St. 1913." He was ordered "to furnish surgical instruments for use in operative dentistry." The applicant seems to have appeared, but did not produce "satisfactory evidence." Nothing is said about whether he produced the instruments. It is claimed in this answer that the applicant's arrangement with Dr. Jackman to become his apprentice was for the purpose of continuing "his illegal practice of dentistry" in violation of section 2811, Rev. St. 1913. It is claimed by the defendants that plaintiff is violating section 2809, Rev. St. 1913, and allied sections. This brings that section up for consideration, although it is now repealed, because the applicant begun his efforts under it and the other sections of that act. Rev. St. 1913, secs. 2795-2820. The act referred to regulates the practice of dentistry in this state. No one questions the right of the dental profession to prescribe reasonable rules and regulations concerning the practice of their profession.

While the district court permitted the defendants to withdraw their answers and to demur to the petition, it had before it the evidence offered, and it seems to have been willing that the evidence taken should be considered by this court, and the judge certifies: "Be it remembered that at the trial of this cause, had before the Honorable William H. Westover, judge of said court,

Patterson v. Morehead.

the plaintiff offered in evidence the papers herein set out; and the plaintiff also offered to take and file as evidence herein the certain depositions which are now hereunto attached; and it was ordered that he might take those depositions and include them in the proposed bill of exceptions." In the journal entry it is said: "And now the said defendants, excepting Jackman, having asked to withdraw their joint answer herein and file demurrer in lieu thereof, plaintiff objects to granting such permission, for the reason that upon the issues joined the defendants have taken depositions and the plaintiff has cross-examined thereon, so that he is entitled to a trial on the merits herein; but the court, having heard the argument of counsel, and being fully advised in the premises, doth overrule said objection, to which plaintiff excepts, and said permission is granted, and accordingly the answer of all defendants is withdrawn, and the defendants, comprising the state board of health and the state board of dental secretaries, and J. E. Woolm, file herein their demurrer to the petition of plaintiff; and now the court, having heard the argument of counsel, and being fully advised in the premises, doth sustain said demurrer in its entirety." The usual 40 days is given to settle the bill of exceptions. One hundred dollars was fixed as the supersedeas bond.

The majority opinion in this case is necessarily based on section 2809, Rev. St. 1913. That section contemplates that the apprentice "desiring to enter upon the practice of dentistry in the state of Nebraska, without graduating from a reputable college in the United States, or producing satisfactory evidence of having been a licensed practitioner in some other state for at least five years, must file with the dental secretaries an affidavit * * * of his intention to begin an apprenticeship with a licensed practitioner of this state." It is then said in this section that "said affidavit must show that the affiant has regularly graduated from a high school or similar place of learning in the United States."

The objection to the section is that the applicant must be a graduate of a reputable college in the United States, or must have been a licensed practitioner in some other state (than Nebraska) for at least five years (a very long time), or he must show that he "has regularly graduated from a high school or similar place of learning in the United States." One or the other of the above things must exist before he can "begin an apprenticeship." I do not object that the dentist shall be possessed of a fair amount of education (the more the better), but it is hard upon an apprentice to say that he shall not start until he has been educated. It ought to be enough if he comes out with an education before he is turned loose as a dentist. If he works while he is an apprentice, he does so under the direct instruction, supervision and direction of the proprietor or another competent dentist. This ought to be enough. The purpose of this section is apparently to cut down the number of dentists and to prevent those who have not received their instruction in the United States from engaging to learn the profession with a practitioner in Nebraska. No difference how competent the proposed apprentice in dentistry might be, he would be excluded under this section.

The section is also objectionable because the proposed apprentice must have received his education in a Nebraska high school or similar place of learning, unless he is a graduate of a reputable college in the United States, or has been a licensed practitioner in some other state (of the United States) for at least five years. The purpose is apparently the creation of an exclusive class in which skilled workmanship, resting on its merits, shall not be entitled to any place. The statute aims at the creation of a monopoly. Nor is it to the interest of the people at large that a proposed apprentice may not be a beginner unless he can produce "satisfactory evidence of having been a licensed practitioner in some other state for at least five years." I think the section

is clearly against public policy. Please to remember that the applicant has up to date been beaten under this section. This section would deprive the whole people of workmen in dentistry who may come from other states and from other countries. It was an un-American section. Canadians speak English very much as we speak it. They are born in a country very much like that in which we live. Very many of them come across the line and make their homes with us. They are found in nearly all the professions and in many of the useful occupations. The Englishman, Scotchman and Irishman come here speaking our tongue and thinking many of the thoughts which we think. They fight battles of the same sort which we fight—battles against ignorance, oppression and vice. The German is said to be the Englishman's cousin. The Scandanavian is related to all of us. All these people readily assimilate with our people. They ought not to be barred out, or driven away by hostile legislation. I do not want the time to come when all the learned professions and the best occupations shall be in the hands of a privileged aristocracy living off of the necessities of the American people. While the section named has been repealed and most of the allied sections have been amended, the whole tendency of the act is yet to exclude good people from becoming dentists. It is one of the most necessary professions.

Our court in *State v. Sperry & Hutchinson Co.*, 94 Neb. 785, 49 L. R. A. n. s. 1123, has announced a principle which seems to be inconsistent with the section referred to. In that case the question was the right of the Nebraska legislature to pass an act prohibiting the business of giving and redeeming trading stamps. The act was held to be violative of section 1 of the Nebraska Bill of Rights, and also Amendment XIV of the Constitution of the United States. Section 1 of the Nebraska Bill of Rights reads: "All persons are by nature free and independent, and have certain inherent and inalienable rights; among these are life, liberty and the pursuit of happiness. To

Patterson v. Morehead.

secure these rights, and the protection of property, governments are instituted among people, deriving their just powers from the consent of the governed." Section 13 of the Nebraska Bill of Rights reads: "All courts shall be open, and every person, for any injury done him in his lands, goods, person, or reputation, shall have a remedy by due course of law and justice administered without denial or delay." That part of article XIV of Amendments to the Constitution of the United States, which seems applicable to the instant case, reads: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

If a dentist may not take an apprentice into his office with a view to getting the benefit of his labor, and with a view to instructing the apprentice, then both are denied liberty and property without due process of law. Nor do they receive the equal protection of the laws. A similar question has been before the supreme court of North Dakota, in the case of *Malin v. La Moure County*, 27 N. Dak. 140, 50 L. R. A. n. s. 997. In that case they undertook to make proceedings in the courts so expensive as to be prohibitive. By a decision of the courts they were promptly opened to the public.

The applicant in this case comes from Minnesota, where it is claimed by his counsel he had earned a diploma and was engaged in the practice of dentistry. He attacks the constitutionality of the whole act. He charges that it creates a trust or monopoly such as is denounced in subdivision 5, sec. 4017, Rev. St. 1913. It is a novelty to try a case on the merits and then to withdraw the answers and stand on a demurrer.

It is objected that the plaintiff has availed himself of the remedy of injunction. I express no opinion about this, but I call attention to the fact that section 2815b,

Clark v. Birge.

of the act of 1915 (Laws 1915, ch. 50), amending and repealing certain sections of the act relating to the practice of dentistry, provides: "Whenever any person is found violating any of the provisions of this act, the state board of dental secretaries, or any citizen, may maintain an action in equity in the name of said state board of dental secretaries or said citizen, to perpetually enjoin said person from doing any of the acts above described." It is suggestive that, if an injunction may be used on one side, it possibly might be used on the other side. It would seem that the act ought to be still further amended and more objectionable sections cut out.

If the evidence taken in the district court and certified to us in the bill of exceptions may properly be considered here then it would seem that the applicant ought to be admitted to practice dentistry. He seems to have attended a dental school, to have stood well in his examinations, and to have done much dental work, and is probably an efficient workman, but I am not certain that he has ever had a license. In any event it appears to the writer that the district court erred in failing to overrule the demurrers of the defendants to plaintiff's petition.

FRANK E. CLARK ET AL, TRUSTEES, APPELLEES, v. WILLIAM W. BIRGE, TRUSTEE, ET AL, APPELLANTS.

FILED FEBRUARY 5, 1917. No. 19158.

1. **Mortgages: FORECLOSURE: SALE.** Where a decree of foreclosure contains no direction to the officer charged with its execution touching the appraisement and sale of the mortgaged property, and the property is contiguous, and was mortgaged as a single tract, its appraisal and sale as such will not be disturbed, in the absence of a showing of prejudice to the complaining party.
2. ———: ———: **APPRAISAL: REVIEW.** "A finding of the court, on the objection that the appraisement of property sold at judicial sale is too low, based on a conflict of evidence, will not be disturbed or reviewed, unless the evidence clearly shows that there was fraud in the appraisement." *Andrews v. Lindley*, 63 Neb. 692. 100 Neb.—49

Clark v. Birge.

APPEAL from the district court for Lincoln county:
HANSON M. GRIMES, JUDGE. *Affirmed*:

Wilcox & Halligan, for appellants.

Stout, Rose & Wells, Hoagland & Hoagland and *W. H. De France*, *contra*.

MORRISSEY, C. J.

The district court for Lincoln county entered a decree of foreclosure and directed the sale of the mortgaged premises, consisting of 1,124 acres. The decree was silent as to whether the property should be appraised and sold in separate tracts or *en masse*. It was appraised as one tract for the sum of \$20,000. Objections to the appraisal were filed alleging that the lands were fraudulently appraised much below their actual value, and that the appraisal ought to have been by government subdivisions of 160 acres or less. The objections were overruled, and the tract was sold to the plaintiffs for \$30,000, a sum a little less than the amount due on the decree.

Defendants have appealed on substantially the same grounds set out in their objections. The lands are contiguous and were mortgaged as a single tract. The record is not specific, but we infer that the property had been used as a single tract.

In *Laughlin v. Schuyler*, 1 Neb. 409, it is held: "Each lot or parcel of ground must be appraised and sold separately, or the sale will be set aside." But in *Kane v. Jonascn*, 55 Neb. 757, it is pointed out that there are exceptions to this general rule, and the court held: "Where a decree of foreclosure contains no direction to the officer charged with its execution touching the appraisement and sale of the mortgaged property, he is vested with a discretion in regard to the matter which will not be disturbed, in the absence of a showing of prejudice to the party complaining."

Clark v. Birge.

"Where lands constituting one body are used as a single tract, ordinarily they may for judicial sale be appraised together." *Smith Bros. Loan & Trust Co. v. Weiss*, 56 Neb. 210.

In the instant case no prejudice to defendants is shown. A number of affidavits are filed setting out that the mortgagees were the only bidders at the sale, and that, had the tract been sold in parcels, other parties might have bid. But defendants do not undertake to show that the entire property would have brought more money if sold in parcels than it brought when sold *en masse*. The fact that the property was mortgaged as a single tract and kept and used in that way for a great many years may indicate that it sold to better advantage as a single tract than if divided into many parcels.

As to the assignment that the property was appraised too low, the sheriff and his appraisers fixed the value at \$20,000, but the plaintiffs evidently realized that this property was all they could get in payment of their liens, and bid \$30,000. Thus it will be seen that defendants have not been prejudiced by the appraisal, unless the value of the property exceeded \$45,000. The valuation placed on the property varies all the way from \$17.50 an acre to \$60. One witness testified that he had had a wide experience in the land and loan business throughout central and western Nebraska. After giving a general description of the property, he placed its value at \$31,000. Another witness, who has had several years experience in the real estate business at North Platte, placed the value at \$35,000. One witness for defendant placed the value as high as \$67,440, but the defendant himself placed it at \$56,200. These estimates are irreconcilable, but when we take into consideration the fact that more than three years have elapsed since the decree was entered, and that defendants might have redeemed at any time by paying the amount due, we are constrained to believe that the defendant and his witnesses have greatly overestimated the value of the property. The trial

Goemann v. State.

judge, who overruled the objections to the appraisement and confirmed the sale, has resided at North Platte, within 7½ miles of this land, for more than 30 years, and has served on the district bench more than 21 years. He must, in the very nature of things, have a general knowledge of land values in his county, and with this knowledge, together with his acquaintance with the appraisers and witnesses, he overruled the objections and confirmed the sale.

When all of the evidence on the question of value is fairly considered, it appears that the objections to the appraisal and confirmation are not well taken. The judgment is

AFFIRMED.

LETTON and ROSE, JJ., not sitting.

SIEMON GOEMANN V. STATE OF NEBRASKA.

FILED FEBRUARY 5, 1917. No. 19816.

1. **Criminal Law: TRIAL: SPECIAL COUNSEL.** It is not error for the trial court, at the request of the county attorney, to appoint special counsel to assist in the prosecution of a misdemeanor.
2. ———: **INSTRUCTION: REASONABLE DOUBT.** Instruction set out in the opinion *held* free from error. In so far as *Burnett v. State*, 86 Neb. 11, is in conflict with this holding, it is overruled.
3. ———: **WITNESSES: CROSS-EXAMINATION: DISCRETION.** "The scope of the cross-examination of a witness rests largely in the trial court, and its ruling will be upheld, unless an abuse of discretion is shown." *Peterson v. State*, 63 Neb. 251.

ERROR to the district court for Wayne county:
ANDREW R. OLESON, JUDGE. *Affirmed.*

C. H. Hendrickson and J. A. Singhaus, for plaintiff in error.

Willis E. Reed, Attorney General, and *Charles S. Roe*, *contra.*

MORRISSEY, C. J.

Plaintiff prosecutes error from a conviction on an information charging him with selling liquor without a license. The county attorney filed a request in writing for the appointment of A. R. Davis, a member of the Wayne county bar, to assist in the prosecution. Defendant filed objections alleging that Davis was employed by private parties to help conduct the prosecution, that he had theretofore been engaged in numerous cases against the defendant, and that by reason thereof he was prejudiced against the defendant, and would not conduct the prosecution in a fair and impartial manner. These objections were supported by an affidavit of the defendant in which he set out the cases wherein Mr. Davis had appeared as counsel against him. The county attorney filed a counter showing admitting that Davis had appeared as counsel in the cases mentioned, but specifically denying all other allegations. The statute does not forbid the employment of counsel by private parties to assist in the prosecution of misdemeanor cases, but in the instant case it is conclusively shown that Mr. Davis was not employed by private parties. The mere fact that he had appeared as counsel in other lawsuits in which Mr. Goemann was a party does not raise a presumption of personal malice, and the showing is sufficient to justify the court in finding that he was a proper and suitable party to assist in the conduct of the state's case. Furthermore, an examination of the entire record fails to show any improper conduct on his part.

The court gave the jury the following instruction: "The term 'reasonable doubt' used in these instructions is a term often used, probably pretty well understood, but not easily defined. It does not mean a mere possible doubt, because everything relating to human affairs and depending upon mortal evidence is open to some possible or imaginary doubt. It means some actual doubt having some reason for its basis.

Goemann v. State.

"A reasonable doubt that entitles the defendant to an acquittal is a doubt reasonably arising from all the evidence, or the lack of evidence, or from a conflict in the evidence, in the case.

"The proof is deemed to be beyond a reasonable doubt when the evidence is sufficient to impress your reason and understanding as ordinarily prudent men and leave your minds in that condition that you can say you feel an abiding conviction to a moral certainty of the truth of the charge made against this defendant."

The giving of this instruction is assigned as error. We fully agree with the trial judge that "the term 'reasonable doubt'" is "pretty well understood, but not easily defined." This court has often been called upon to pass on instructions undertaking to define the term. In *Cowan v. State*, 22 Neb. 519, 525, an instruction which told the jury that a reasonable doubt is "a doubt for having which the jury can give a reason, based upon the testimony," was held to be erroneous. The question was again before the court in *Carr v. State*, 23 Neb. 749, and the court said: "It is error to charge a jury that it is a doubt for the having of which the juror can give a reason derived from the testimony." In this opinion the holding in *Cowan v. State* is adhered to, but it is pointed out that the instruction in that case is not wholly without support. It is also said that the clause in the instruction requiring the reversal was one which required the jury to be able to give a reason for entertaining the doubt. An instruction in *Childs v. State*, 34 Neb. 236, differs in phraseology, but the holdings in *Cowan v. State* and *Carr v. State* were adhered to. In *Whitney v. State*, 53 Neb. 287, the court approved an instruction in the following language: "You are instructed that a reasonable doubt is an actual, substantial doubt arising from the evidence, or want of evidence, in the case. That by reasonable doubt is not meant that the accused may possibly be innocent of the crime charged against him, but it means some actual doubt having

Goemann v. State.

some reason for its basis. A reasonable doubt that entitles to an acquittal is a doubt reasonably arising from all the evidence, or want of evidence, in this case. The proof is deemed to be beyond a reasonable doubt when the evidence is sufficient to impress the reason and understanding of ordinarily prudent men with a conviction on which they would act in the most important concerns or affairs of life."

Some confusion has arisen owing to the decision in *Burnett v. State*, 86 Neb. 11. But this court has frequently refused to reverse a judgment of the district court solely on account of an instruction worded as in the case at bar. In so far as *Burnett v. State* is in conflict with this holding it is overruled.

There are a number of other assignments directed against the rulings of the court on the cross-examination of witnesses for the state. Fred Lerner was called as a witness, and testified that upon the date charged in the information he purchased a pint of whiskey from the defendant. On cross-examination defendant's counsel asked him if he had not been arrested on a criminal charge the year before. Objection to this question was sustained, whereupon defendant's counsel made the following offer: "We offer to prove by the witness that he was arrested on a criminal charge in county court of Wayne county, Nebraska, during the year 1915, and was tried for the same offense before the county judge of Wayne county, Nebraska." Objection was sustained to this offer. It is argued that the evidence was offered for the purpose of testing the credibility of the witness. The offer does not undertake to show that the witness was convicted. An arrest and trial without a conviction could not discredit him before the jury or affect his credibility. Arthur O'Connell, another witness for the state, testified that he, together with the witness Lerner, and two others, drove to defendant's livery stable in an automobile; that Lerner went into the barn, but soon returned, and had with him a pint of whiskey, that he

Goemann v. State.

offered witness a drink from the bottle, which witness refused. On cross-examination defendant's counsel undertook to show that Lerner at other times and places had offered O'Connell whiskey, and that Lerner kept whiskey in Goemann's livery barn. To these questions objection was made and the evidence excluded.

The scope of the cross-examination of a witness rests largely within the discretion of the trial court. Ordinarily it is better to permit considerable latitude. But the matters sought to be elicited on cross-examination were outside the scope of the witness' testimony in chief, and if proper and material in behalf of defendant they might have been shown in defendant's case in chief.

There is a further assignment that the court excluded evidence calculated to impeach the witness Lerner. This impeachment was directed to an immaterial matter that was drawn out on his cross-examination, and the evidence was properly excluded.

"The cross-examination of a witness should be restricted to the facts and circumstances drawn out on his direct examination. If it is desired to examine the witness upon other matters, the party desiring such examination must make the witness his own, and call him as such." *Davis v. Neligh*, 7 Neb. 84.

Finally, it is insisted that the evidence does not sustain the verdict. We have read the entire record, but it would serve no useful purpose to set out the evidence at length. The story told by the state's witnesses is sufficient to sustain the verdict, if true. It was denied by defendant, and he was corroborated in the main by another witness. All of these witnesses were residents of Wayne county. They were probably personally known to most of the jury. The jury heard them testify and saw fit to believe the witnesses for the state. The evidence would sustain a verdict either way. We cannot set our judgment up against that of the jury, and the judgment is

AFFIRMED.

HAMER, J., dissenting.

I am not quite able to agree with the majority opinion. The information charges that on or about the 18th day of September, 1915, in the city of Wayne, county of Wayne, and state of Nebraska, one Siemon Goemann unlawfully and feloniously sold to one Fred Lerner one pint of whiskey, and that at the time he sold the same he did not have a license to sell intoxicating liquors in said city or county. The same charge is made against Goemann for selling whiskey to Lerner on the 26th of September. "Bootlegging"—that is, the selling of intoxicating liquor without license—is generally regarded with much disfavor and as deserving of certain punishment. The plaintiff in error, Goemann, hereafter called the defendant, was fined \$250 for selling the pint of whiskey mentioned in the first count. He was acquitted on the second charge. An offender charged with "bootlegging" is, in the eyes of the law, entitled to a fair trial. He should be tried just as fairly as if charged with a more serious infraction of the law. The rules of evidence are just the same as applied to all alleged violators of the law. It is not enough that the evidence is sufficient to raise a suspicion to the effect that the defendant is guilty. To justify a verdict of guilty the evidence should be strong enough to convince the reason of an impartial juror, after a consideration of all the facts and circumstances pertaining to the case, and regardless of consequences. If the evidence fails to establish the guilt of the accused beyond a reasonable doubt, then he should be acquitted. Certain witnesses testified that the defendant was in sight, and that he did not go to the back of the barn, where Lerner says the transaction took place. It was for the jury to say whether they believed Lerner, or whether they believed the witnesses who testified for the defendant. All that the defendant is entitled to is a fair trial, and, if the evidence justifies his conviction, then he must pay the penalty.

If an improper instruction was given which was prejudicial to the defendant, then he is entitled to a new trial. In the instant case the court has taken the occasion to justify an instruction that seems to be vicious in the extreme. The objectionable instruction, as it appears in the majority opinion, is divided into three paragraphs, a part of which we will present as we discuss the instruction. In the first of these paragraphs it is said: "It (a reasonable doubt) does not mean a mere possible doubt, because everything relating to human affairs and depending upon mortal evidence is open to some possible or imaginary doubt. It means some actual doubt having some reason for its basis." This was telling the jury that before they could acquit the accused they must give "some reason" for such acquittal. So far as this part of this instruction is concerned, there might be all sorts of doubts in the mind of the juror as to the guilt of the accused, and reasoning the best he might, and closely analyzing the evidence, he might be uncertain of the guilt of the accused, but this part of the instruction compels the juror to give a reason. He is required to explain why he dares to doubt. It was never intended that the juror should be placed by the court in such a position that he would have to explain what he had done.

It is next said: "A reasonable doubt that entitles the defendant to an acquittal is a doubt reasonably arising from all the evidence, or the lack of evidence, or from a conflict in the evidence, in the case."

The burden of proof is upon the state, and, if the state fails to establish its case by sufficient proof, then it is the duty of the jury to acquit the defendant, and whether they can say that the doubt which they entertained reasonably arises from the evidence, or the lack of evidence, or from a conflict in the evidence, is immaterial. The question is whether the juror doubts the guilt of the accused. The juror is oftentimes a strong citizen with the clearest sort of perception concerning those things

Goemann v. State.

with which he is familiar, but to load him up with a task like that contained in the second paragraph of this instruction is altogether too much. Besides, it is dangerous, and that sort of a rule is likely to result in the conviction of a good man or a good woman. If this defendant is supposed to be a "bootlegger," there may be a feeling, an unconscious feeling, that he is not entitled to the same protection that other persons charged with violating the law may clearly be entitled to. But a bad rule established in this case is likely to be used against your best citizen when he is put on trial upon the charge of murder, although what he has done was done in self-defense. A bad rule once started out never loses its power to do harm.

The instruction justified in the case at bar is not unlike an instruction given in *Flege v. State*, 93 Neb. 610. In that case the defendant was charged with murder. The obnoxious instruction reads: "And, if you believe the defendant not guilty, and that he did not shoot and kill the said Louise Flege, as alleged in the information, or in the event that the evidence introduced in the case is so evenly balanced that you cannot tell whether defendant or some other person shot and killed the deceased, as alleged, then you should acquit the defendant, or if you entertain any reasonable doubt of the guilt of the accused of the crime charged in the information, then you should give the defendant the benefit of such doubt and acquit him."

Touching this instruction, this court said that the instruction was "objectionable in several particulars: First, if the jury believe the defendant not guilty, they should acquit; second, if they believe he did not shoot and kill the deceased, they should acquit him; third, if the evidence is evenly balanced, they should acquit; fourth, if they cannot tell whether defendant or some other person committed the crime, they should acquit; or, fifth, if they have any reasonable doubt of his guilt, they should acquit. We know of no rule of law that

Goemann v. State.

requires the jury to 'believe the defendant not guilty,' or that he 'did not shoot and kill' the decedent before they could acquit." In the instant case the jury are treated by the instruction given as if they were trying to shirk a duty. Oftentimes the jurors are fairly intelligent, and sometimes the learning which they possess is superior to that of the man who assumes to instruct them, although he may have had more training along a particular line than they. There is also in the paragraph quoted the idea that the defendant is guilty. No court has any business to say that, even when the offense is so small as the sale of a pint of whiskey.

In *Bartels v. State*, 91 Neb. 575, the defendant was charged with stealing a lot of chickens, 56 of them, I believe. The trial court properly looked on this offense with great disfavor. He therefore charged the jury: "The rule which clothes every one accused of crime with the presumption of innocence, and imposes upon the state the burden of establishing his guilt beyond a reasonable doubt, is not intended to aid any one who is in fact guilty to escape, but is a humane provision of the law intended, so far as human agencies can, to guard against the danger of an innocent person being unjustly punished. A doubt, to justify an acquittal, must be reasonable, and it must arise from a candid and impartial investigation of all the evidence in the case; and unless it is such that, were the same kind of a doubt interposed in the graver transactions of life, it would cause a reasonable and prudent man to hesitate and pause, it is insufficient to authorize a verdict of not guilty. If, after considering all the evidence, you can say you have an abiding conviction of the truth of the charge, you are satisfied beyond a reasonable doubt."

In that case Judge Sedgwick, delivering the opinion of the court, said: "If we consider that the witness Phillips was by his own testimony an accomplice in guilt, and that his evidence is wholly uncorroborated, it would seem probable that the jury by the eleventh instruction above

Goemann v. State.

quoted were led to believe that there must be some special circumstances in the case 'to justify an acquittal' and 'authorize a verdict of not guilty.'" It will be noticed that the first sentence of the instruction last above quoted from treats the subject of reasonable doubt as if made for innocent persons alone, and not intended to let the guilty escape. There is also in it the same theory that the jury are not at liberty to render a verdict of acquittal unless they "justify" themselves.

In *Burnett v. State*, 86 Neb. 11, this court seems to have condemned the following instruction: "A reasonable doubt, as used in these instructions, to justify an acquittal, must be a reasonable one arising from a candid and impartial investigation of all of the evidence in the case. A doubt produced by an undue sensibility in the mind of any juror in view of the consequences of his verdict is not a reasonable doubt, and the juror is not allowed to create sources or materials of doubt by resorting to trivial or fanciful suspicions and remote conjectures as to a possible state of facts differing from those established by the evidence. You are not at liberty to disbelieve as jurors if, free from all the evidence, you believe as men. Your oath imposes on you no obligation to doubt where no doubt would exist if no oath had been administered. That by reasonable doubt is not meant that the accused may possibly be innocent of the crime charged against him, but it means some actual doubt having some reason for its basis. A reasonable doubt that entitles to an acquittal is a doubt reasonably arising from all the evidence or want of evidence, in this case. The proof is deemed to be beyond a reasonable doubt when the evidence is sufficient to impress the reason and understanding of ordinarily prudent men with a conviction on which they would act in the most important concerns and affairs of life."

The opinion in that case was prepared by Judge Barnes. There was only one dissent. The judgment of the court below was reversed. While the instruction

Goemann v. State.

in that case is different from the very obnoxious instruction in this case, there is some similarity. The similarity is in the language which holds the jury up as if it were guilty and likely to go wrong, and that a court, because it was a court, had a right to talk to the jurors as if it possessed the sum total of human virtues. I hope that the syllabus in this case, which seems to justify the use of the instruction in the *Burnett* case, may be overruled at once. We cannot afford to use any part of the instruction used in Chicago to hang the anarchists. *Spies v. People*, 122 Ill. 1. Although the opinion in the foregoing case was filed only 30 years ago, it is as much a historical relic in several states as the hanging of innocent women at Salem, Massachusetts, on the charge of witchcraft. Of course, the judges in the witchcraft cases were no more to blame than their neighbors. The instructions in the *Spies* case were:

"(12) The court instructs the jury, as a matter of law, that in considering the case the jury are not to go beyond the evidence to hunt up doubts, nor must they entertain such doubts as are merely chimerical or conjectural. A doubt, to justify an acquittal, must be reasonable, and it must arise from a candid and impartial investigation of all the evidence in the case; and unless it is such that, were the same kind of doubt interposed in the graver transactions of life, it would cause a reasonable and prudent man to hesitate and pause, it is insufficient to authorize a verdict of not guilty. If, after considering all the evidence, you can say you have an abiding conviction of the truth of the charge, you are satisfied beyond a reasonable doubt.

"(13) The court further instructs the jury, as a matter of law, that the doubt which the juror is allowed to retain in his own mind, and under the influence of which he should frame a verdict of not guilty, must always be a reasonable one. A doubt produced by undue sensibility in the mind of any juror, in view of the consequences of his verdict, is not a reasonable doubt, and a

PIERSON v. LAWLER.

juror is not allowed to create sources or materials of doubt by resorting to trivial and fanciful suppositions and remote conjectures as to possible states of fact differing from that established by the evidence. You are not at liberty to disbelieve as jurors, if, from the evidence, you believe as men. Your oath imposes on you no obligation to doubt, where no doubt would exist if no oath had been administered."

The foregoing instructions were the outgrowth of a state of war in Chicago, and they were no doubt intended and constructed to secure the conviction and execution of the anarchists on trial. We have no state of war in Nebraska, and these instructions should not be followed.

It is an invasion of the province of the jury in a criminal case when the court lectures the jury and gives it to understand that it must render a verdict in a particular way. The jurors are there for the purpose of exercising their best judgment, and a court has no business to attempt to crowd them out of the exercise of their peculiar functions. It is also very objectionable when the court indicates that it has any opinion touching the merits of a criminal case. We all know how ready the jurors are to catch the words of the trial court and to be controlled by them.

FRED PIERSON, APPELLANT, v. DAVID A. LAWLER ET AL.,
APPELLEES.

FILED FEBRUARY 5, 1917. No. 19029.

1. **Aliens: RIGHT TO INHERIT.** Under a treaty removing the statutory disqualification of a nonresident alien to inherit land in Nebraska and providing that he "shall be allowed a term of three years in which to sell the same, this term to be reasonably prolonged if circumstances render it necessary," the disqualifying statute is suspended, but if the alien fails to sell the land within the prescribed period the title vests in those to whom it would have de-

Pierson v. Lawler.

scended in absence of a treaty. Rev. St. 1913, sec. 6273; 31 U. S. St. at Large, art. I, p. 1939.

2. ———: ———. Under a treaty suspending the statute disqualifying a nonresident alien from inheriting land in Nebraska and providing that he "shall be allowed a term of three years in which to sell the same, this term to be reasonably prolonged if circumstances render it necessary," it is a question for the judiciary whether the circumstances were such as to prolong the prescribed period. 31 U. S. St. at Large, art. I, p. 1939.

APPEAL from the district court for Keith county:
HANSON M. GRIMES, JUDGE. *Affirmed as modified.*

J. G. Beeler, for appellant.

Hoagland & Hoagland, contra.

ROSE, J.

This is an action to partition the northwest quarter of section 34, township 13, range 35 west, in Keith county. The case was presented to the trial court on controverted issues relating to title and to the respective shares of the owners. When the land belonged to Josiah Weir, he died intestate September 20, 1901, leaving as his only heirs a brother, John C. Weir, and two sisters, Grace Beveridge and Mary Young, the latter being an alien residing in Scotland. Grace Beveridge died in September, 1906, leaving as her only heirs nine children. Through conveyances from John C. Weir, Mary Young and three Beveridge heirs, plaintiff claims an undivided seven-ninths of the land. Defendant, David A. Lawler, concedes that plaintiff owns the interests of three Beveridge heirs, but, subject thereto, claims title to the land through foreclosure of a mortgage, a decree quieting title, and conveyances from six Beveridge heirs. From a decree confirming in defendant David A. Lawler an undivided eight-ninths, plaintiff has appealed.

At the time of Josiah Weir's death the land was incumbered by a mortgage. The Farm Land Company, as holder of the mortgage, commenced a foreclosure suit February 23, 1903, making Grace Beveridge, Mary Young

and John C. Weir defendants; summons being served upon the latter, but not upon the other two. A decree of foreclosure and an order of sale followed. In the publication of the notice of sale, in the appraisal, in the sale, and in the sheriff's report of the sale, the land was described as the northeast quarter instead of the northwest quarter. The sale was confirmed by the district court, and the sheriff executed and delivered to the Farm Land Company, as purchaser, a deed correctly describing the mortgaged premises. In 1908 the Farm Land Company commenced a suit to quiet its title and brought into court as defendants John C. Weir, Mary Young and the Beveridge heirs. John C. Weir employed an attorney to make a defense for all of the defendants. After issues were joined by the pleadings the trial court, upon a stipulation by counsel, entered a decree quieting in the Farm Land Company title to an undivided one-half and in the Beveridge heirs title to an undivided one-half. The stipulation recited that Mary Young was a subject of Great Britain residing in Scotland, and provided further: "That the said Mary Young was incapable of inheriting any interest in said real estate, and that the said John C. Weir and the said Grace Beveridge each succeeded to an undivided one-half of said land." The interest acquired by the Farm Land Company was subsequently sold to defendant David A. Lawler, who purchased also the interests of six Beveridge heirs.

It is contended that the error in the description of the mortgaged land invalidated the sheriff's sale, that the interest of John C. Weir was not foreclosed, and that plaintiff acquired it by purchase. The determination of the question thus raised is not necessary to a decision, since it is conclusively established by the decree in the suit to quiet title that John C. Weir had no interest in the land. He had been fully informed of the action his attorney would take in entering into the stipulation and he acquiesced therein. It follows that he is bound by the decree, that he did not thereafter have any interest in the land, and that he conveyed nothing to plaintiff.

Pierson v. Lawler.

The principal question presented by the appeal relates to the rights of Mary Young, from whom plaintiff procured a quitclaim deed. It is argued that, under a treaty between the United States and Great Britain, she inherited one-third of the land of her deceased brother, and that the decree barring her inheritance in the suit to quiet title is void as to her for the reason that it was based on an unauthorized stipulation. The treaty upon which plaintiff relies provided:

"Where, on the death of any person holding real property (or property not personal), within the territories of one of the contracting parties, such real property would, by the laws of the land, pass to a citizen or subject of the other, were he not disqualified by the laws of the country where such real property is situated, such citizen or subject shall be allowed a term of three years in which to sell the same, this term to be reasonably prolonged if circumstances render it necessary, and to withdraw the proceeds thereof, without restraint or interference, and exempt from any succession, probate or administrative duties or charges other than those which may be imposed in like cases upon the citizens or subjects of the country from which such proceeds may be drawn." 31 U. S. St. at Large, art. I, p. 1939.

In the absence of a treaty, the inheritance of land by a nonresident alien would be defeated by a statute of Nebraska. Rev. St. 1913, sec. 6273. The nature of the interest acquired by a nonresident alien under the terms of the treaty and the descent of title are subjects which have been explained as follows:

"There is much discussion in the cases as to the nature of the title which nonresident aliens held under the terms of this treaty. Some authorities denominate it a base or qualified fee, and others as a terminable fee. The terminology is not of controlling importance. That the right to sell carried with it the ownership as a necessary incident to the power of sale is held by all the authorities.

Pierson v. Lawler.

That such ownership was something less than a fee simple absolute is also quite beyond discussion. That the remainder of such title vested in the resident heirs, and that such remainder drew the full fee-simple title into such resident heirs upon failure of the condition upon which the nonresident aliens took their title, seems to us clear. The authorities are quite uniform, also, in holding that, upon failure of the condition imposed by the treaty, the title of the nonresident alien would fail by operation of law. Under such circumstances the treaty furnishes no further impediment to the statute. It ceases, so to speak, to suspend the statute, and the full fee-simple title vests in the persons upon whom the statute undertook to cast it in the first instance. This is the net result in all the cases, although it may be reached by a different course of reasoning, and by the use of a varying terminology." *Ahrens v. Ahrens*, 144 Ia. 486. *Wunderle v. Wunderle*, 144 Ill. 40, 64-67.

In this view of the law, Mary Young, notwithstanding the statute prohibiting a nonresident alien from inheriting land in Nebraska, acquired under the treaty the right to sell an undivided one-third of the land in controversy within three years, "this term to be reasonably prolonged if circumstances render it necessary." Did she make the sale within that period? She attempted to sell her interest in the land May 8, 1912, more than eleven years after the death of her brother Josiah Weir. Plaintiff argues that the treaty is not self-executing, and that the right of sale continues until a time limit is set by the legislature—a step not taken by the lawmakers. The time for exercising the right, however, is fixed by the treaty itself, and the necessity for prolonging the period is a question for the judiciary. *Scharpf v. Schmidt*, 172 Ill. 255. Do the circumstances require a finding that the time should be prolonged more than eight years beyond the three-year period specified in the treaty? Plaintiff insists that climatic and financial conditions and clouds on the title made the land unsalable

State, ex rel. Lutt, v. Raymond Township.

and justified the delay. In the light of the evidence this position seems to be untenable. While there is evidence tending to show that the land was unsalable in 1903 and 1904, it is not shown that the same conditions prevailed from 1905 to 1908 or that Mary Young attempted to make a sale prior to 1912. The record of the foreclosure fails to show service of process upon Mary Young, the nonresident alien. As to her the decree of foreclosure was void on its face. Notwithstanding the decree in the suit to quiet title she found a purchaser. Circumstances showing a necessity for prolonging the period a sufficient length of time to uphold the conveyance from Mary Young to plaintiff are not proved. She in fact lost her interest in the land before the suit to quiet title was instituted. It follows that defendant David A. Lawler acquired from the Farm Land Company an undivided three-sixths and from six Beveridge heirs an undivided two-sixths, making in all an undivided five-sixths of the land in controversy. An undivided one-sixth was acquired by plaintiff from three Beveridge heirs. The judgment of the district court is modified to confirm the shares in the manner indicated, and as thus modified it is affirmed.

MODIFIED AND AFFIRMED.

LETTON, J., not sitting.

STATE, EX REL. E. H. LUTT ET AL., APPELLEES, v. RAYMOND
TOWNSHIP ET AL., APPELLEES;
CHRIS JOHNSON, APPELLANT.

FILED FEBRUARY 5, 1917. No. 19140.

Highways: DEDICATION: ACT OF CONGRESS. The act of the Congress of March 2, 1889, which "reserved public highways four rods wide around every section of land allotted, or opened to settlement," in the Sioux Indian reservation, amounted to a grant or a dedication for highway purposes. 25 U. S. St. at Large, ch. 405, sec. 21, p. 897.

State, ex rel. Lutt, v. Raymond Township.

APPEAL from the district court for Knox county:
ANSON A. WELCH, JUDGE. *Affirmed.*

W. A. Meserve, for appellant.

M. F. Harrington and E. A. Houston, contra.

ROSE, J.

This is an appeal from an order allowing a peremptory writ of mandamus commanding Chris Johnson, as road overseer of Raymond township in Knox county, to open a public highway four rods wide on a section line in what was a part of the Sioux Indian reservation which was allotted to Indians and opened to settlement by the act of Congress of March 2, 1889. 25 U. S. St. at Large, ch. 405, p. 888. The act provides: "There shall be reserved public highways four rods wide around every section of land allotted, or opened to settlement by this act, the section lines being the center of said highways; but no deduction shall be made in the amount to be paid for each quarter-section of land by reason of such reservation. But if the said highway shall be vacated by any competent authority the title to the respective strips shall inure to the then owner of the tract of which it formed a part by the original survey." 25 U. S. St. at Large, ch. 405, sec. 21, p. 897.

Most of the lands along the highway in controversy are Indian allotments, the title to which is being held by the United States as trustee for the allottees.

Respondent contends that the Congress did not grant or dedicate land for highways on Indian allotments, and that the word "reserved," in the connection in which it is used in the statute, means that the United States retained the title to land intended for highway purposes. The Congress "reserved" a piece of land "four rods wide around every section of land allotted, or opened to settlement." The word "reserved" should be construed in connection with the context and the obvious purpose of the legislation. The object was to permit Indians to

State, ex rel. Lutt, v. Raymond Township.

hold allotted lands in severalty and to open the remainder of the reservation to settlers under the homestead laws. For these purposes highways were necessary. It was the intention of the lawmakers to allow allotted lands and homesteads to pass in due time from the control of the Congress to private individuals. It was not the intention to retain a narrow piece of land around each section. This is shown by the act itself, which declares: "But if the said highway shall be vacated by any competent authority the title to the respective strips shall inure to the then owner of the tract of which it formed a part by the original survey." 25 U. S. St. at Large, ch. 405, sec. 21, p. 897.

It is also contended that, under a later act, a highway over allotted land in an Indian reservation cannot be opened without the consent of the secretary of the interior, and that his consent was not procured. The new legislation is found in the act of March 3, 1901, and provides: "The secretary of the interior is hereby authorized to grant permission, upon compliance with such requirements as he may deem necessary, to the proper state or local authorities for the opening and establishment of public highways, in accordance with the laws of the state or territory in which the lands are situated, through any Indian reservation or through any lands which have been allotted in severalty to any individual Indians under any laws or treaties but which have not been conveyed to the allottees with full power of alienation." 31 U. S. St. at Large, ch. 832, sec. 4, p. 1084.

The enactments do not contain contradictory or inconsistent provisions. The act of 1889 contains a special provision relating to highways in the Sioux Indian reservation. The act of 1901 is a general one and does not in direct terms or by implication amend or repeal the former law. Both may be enforced as enacted. *Jackson v. Washington County*, 34 Neb. 680; *State v. Clarke*, 98 Neb. 566.

In re Estate of Johnson.

Respondent contends further that there has been no proper acceptance of the highway. The grant or dedication by the Congress respects the public policy of Nebraska as declared by an act providing that "the section lines are hereby declared to be public roads in each county," and that "the county board may, whenever the public good requires it, open such roads." Rev. St. 1913, sec. 2899. The county board of Knox county, July 16, 1908, made an order for the establishment of the highway in controversy. Acceptance of the grant or dedication is shown.

Notice to file claims for damages was given, but no claims were filed. The necessity of making provision for the payment of damages as a condition of opening the highway is therefore not determined.

The peremptory writ was properly allowed.

AFFIRMED.

IN RE ESTATE OF SWAN JOHNSON.

ANNA LOVISA JOHNSON ET AL., APPELLEES, v. ALBERT JOHNSON ET AL., APPELLANTS.

FILED FEBRUARY 5, 1917. No. 18741.

1. **Witnesses: CROSS-EXAMINATION.** In a contest of a will on the ground of undue influence, if a proponent of the will, who is a beneficiary thereunder, is alleged by the contestants to have used undue influence to obtain the execution of a will favorable to himself, and becomes a witness in his own behalf and contradicts evidence of circumstances tending to prove undue influence on his part, the court should allow a free and complete cross-examination of the witness as to his conduct toward the testator prior to and in connection with the making of the will.
2. **Wills: CONTEST: UNDUE INFLUENCE: EVIDENCE.** If the proposed will recites a reason for disinheriting a son who is contesting the will on the ground of undue influence by those who are beneficiaries therein, it is competent, in connection with other evidence tending to show such undue influence, to prove that no such reason in fact existed.

In re Estate of Johnson.

3. **TRIAL: OFFER OF PROOF.** When a question is asked that does not "indicate to the trial court the relevancy of the testimony," it is not error to exclude the testimony, unless the party propounding the question informs the trial court as to the relevancy of the testimony, and an offer of proof will enable the trial court to determine whether the evidence is competent. When the condition of the record and the form of the question itself show that it is relevant and competent, no offer of proof is necessary. The many decisions of this court in regard to requiring an offer of proof should be so understood.
4. **WILLS: CONTEST.** Every one is entitled to the control of his property while living, and by will to direct its use after his death. The trial of a proposed will is to determine whether it is in fact the will of the decedent rather than the will of interested parties who have procured its execution by undue influence.
5. ———: ———: **UNDUE INFLUENCE: EVIDENCE.** Evidence of statements of the decedent, not made at the time of executing the will, are generally held incompetent as substantive proof of undue influence, but such statements are received in evidence if they tend to prove the condition of mind of the decedent as to his unbiased inclination in the disposition of his property, and are not otherwise objectionable.
6. ———: ———: ———: **INSTRUCTIONS.** It is not in all cases true that "influence that amounts to undue influence must be such as to compel, overpower, and coerce one to do something which he does not want to do." Under the circumstances in this case it was error to so instruct the jury.
7. ———: ———: ———: ———. If undue influence is established by a preponderance of the evidence, the proposed will must be rejected. An instruction which tells the jury that unless they are convinced thereby they cannot reject the will is not accurate, and under some circumstances may be prejudicial.
8. ———: ———: **APPEAL: TRIAL DE NOVO.** Upon appeal to the district court from the judgment of the county court admitting a proposed will to probate, the district court tries all questions *de novo*. That court must determine whether the proposed will has been altered and the consequences of such alteration, if any.

APPEAL from the district court for Kearney county:
HARRY S. DUNGAN, JUDGE. *Reversed.*

Brown, Baxter & Van Dusen, Lewis C. Paulson and Thomas F. Hamer, for appellants.

Hague & Anderbery, contra.

In re Estate of Johnson.

SEDGWICK, J.

The proposed will of Swan Johnson, deceased, was contested in the county court of Kearney county and there admitted to probate. Upon appeal to the district court for that county the probate of the will was sustained, and the contestants have appealed to this court.

The deceased was a retired farmer, living at the time of his decease at Axtell, in Kearney county, and he died about the 29th day of September, 1912. He left surviving him his wife, one of the proponents, Anna Lovisa and four sons, Edward H., Arthur G., Hardie L., and Albert Johnson, and one daughter Annie E. Jacobson, and two children of a deceased son, and Charles F. Johnson, a son of the decedent by a former wife. The decedent left property, real and personal, of value variously estimated from \$36,000 to \$50,000. This property consisted mainly of three farms of 160 acres each, and a house and lot in the town of Axtell. The proposed will devised the three farms, one to Edward H. Johnson, one to Arthur G. Johnson, and one to Hardie L. Johnson. To his wife he gave the town property, and a life interest in the three farms and all of his personal property. To his daughter, Annie E. Jacobson, and his son, Albert Johnson, he gave each the sum of \$3,600, and provided that these bequests should be paid by the devisees of the land, and that they should constitute a lien upon the land devised subject only to the lien of the widow's life estate. The principal grounds of contest were that the deceased "was not possessed of sufficient mental capacity to make a valid will," and "was not of sound mind and disposing memory," and that the execution of the proposed will "was brought about through undue influence" by his wife and his sons, Edward H., Arthur G., and Hardie L. Johnson, and that the deceased at the time of executing the proposed will was laboring under delusions and mistakes in regard to the value of his property and in regard to "certain indebtedness which he believed to be due from his son, Charles F. Johnson," with no such

In re Estate of Johnson.

indebtedness existing. It is now contended that the judgment of the district court is not supported by the evidence, and that the court erred in excluding evidence and in restricting the cross-examination of one of the proponents of the will.

At the time of signing of the proposed will, Charles F., the decedent's son by his former wife, was nearly 50 years of age, and was residing with his wife and children in Omaha. The decedent was about 70 years of age, and had been for several months suffering with a fatal disease, which caused him much suffering and caused his death a few weeks after the signing of the proposed will. The proponent, Edward, was residing on one of the farms of the decedent, a few miles from the town of Axtell, where the decedent was residing, and on Sunday, the day before the proposed will was signed, he, with the other sons to whom the farms were devised, were at the home of their father and mother, and the next morning Edward took the decedent to a lawyer's office, where the will was drawn and executed. There is evidence that Charles and Edward were not on friendly terms, and it is the theory of the contestants that Edward, with the assistance of his mother and the other substantial beneficiaries under the will, unduly influenced the decedent in executing the same. The proposed will states as the reason for disinheriting Charles that "I relinquish all right and cancel all indebtedness from Charles F. Johnson to me. * * * The indebtedness due me from Charles F. Johnson constitutes notes and debts which I paid for him about twenty-four years ago in the principal sum of about seven hundred dollars no part of which he has ever paid me." There is evidence that when Charles was a young man his father assisted him to obtain title to a piece of land, and that Charles occupied the land for some time and became indebted, the land being incumbered, and unable to finish paying for the land. It was thereupon arranged between Charles and his father,

In re Estate of Johnson.

at about the time mentioned in the foregoing quotations from the will, that Charles should convey title to his father and his father pay the indebtedness. This was done, and the decedent occupied the land for about two years and paid off all the indebtedness, and then sold the land, realizing about \$1,000 more than he had invested in the land and the indebtedness, so that the recital in the will of the reason for disinheriting Charles was entirely contrary to the fact. No other reason is shown, and the evidence is that the decedent visited Charles and his family at Omaha, and that Charles, shortly before the death of the decedent, was at the home of the decedent for some weeks and took care of his father, and that the relations between them were all that could be desired between father and son. The fatal disease with which the deceased was suffering was not of such a nature as to impair his mental faculties, but he had been a vigorous, active man, he had suffered for months, and fully realized that this disease and the suffering caused thereby would very soon end his life. Edward was then about 36 years of age, had not been living with his father for several years, but saw him frequently, and it would seem that their relations also were pleasant. The theory of the contestants is that, in this consultation of the family with the dying man on Sunday, the terms of the proposed will were arranged for him, and that he yielded to the dictation of his wife and her children, who caused to be repeated in his will the ungrounded reason for disinheriting Charles. It was therefore very important to know the nature of that consultation and the matters discussed and the manner of discussing them. On the trial evidence had been introduced of hostilities on the part of Edward toward his half-brother Charles, and tending to show that Edward had at times remonstrated with his father against any assistance to Charles. Other circumstances appeared in the evidence that might be considered to indicate that Edward was much interested

In re Estate of Johnson.

in preventing his father from recognizing Charles as an object of his bounty. The theory of the contestants was that these circumstances, in connection with the fact of this family consultation so soon before the proposed will was executed, and the fact that Edward was preferred in the proposed will tended to prove that Edward had used undue influence with his father. To rebut this theory Edward was called as a witness by the proponents and was asked, "You have heard the testimony of Albert concerning statements made by you, or purporting to have been made by you, at your father's home, upon various occasions?" and answered, "Yes, sir." He was asked: "Q. Did you at any time or at any place protest to your father in reference to extending credit to Albert? A. No, sir. Q. Or to Charley? A. No, sir. * * * Q. You heard Mrs. Vath's testimony, did you not? A. Yes, sir. Q. State whether or not you stated that Albert and Charles were not to have anything, as testified to by her. A. No, sir; I never said so. Q. Did you at any time make such a statement? A. No, sir. Q. You heard the testimony of Mrs. Albert Johnson? A. Yes, sir. Q. You heard her state that you have said on several occasions that neither Albert nor Charles should have anything? A. I never said so. Q. Did you at any time or to any person make such statements? A. No, sir." This evidence of Edward's amounts to a denial that he had used influence with his father in regard to the disposition of his property. It was clearly relied upon for that purpose, and on the cross-examination he was asked, "Q. You are the Ed. Johnson who came with your father to Minden the day this will was drawn? A. Yes, sir. Q. What time in the day did you get here?" This question was objected to as improper cross-examination, the objection was sustained, and exception taken to the ruling. He was then questioned, and answered, as follows: "Q. How frequently did you visit at your father's house during the last few months of his life? A. Whenever I would go

In re Estate of Johnson.

to town I would go down there and talk to him a few minutes; and we would go to church Sundays, and go there for dinner, and stay there a little while in the afternoon, and then go home. Q. Were you there on Sunday, the 2d of July? A. Yes, sir. Q. Was Arthur there? A. Yes, sir. Q. Was Hardie there? A. Yes, sir. Q. Was Albert there? A. No, sir. Q. Was Charley there? A. No, sir. Q. Was Mrs. Vath, the mother of Emil's children, there? A. No, sir. Q. Was your mother there? A. Yes, sir. Q. Now, at that time did you make an arrangement with your father to come to Minden the next day?" This question was objected to as improper cross-examination, and the objection sustained, and the ruling excepted to. He was then asked, "At that time was the subject of the change of the will discussed?" to which a similar objection was sustained.

It is contended that the contestants cannot now object to this ruling because no offer of proof was made, and the following is quoted from the decision of this court in *Blondel v. Bolander*, 80 Neb. 531: "In order to predicate error upon the rejection of testimony, the party complaining of its exclusion must have made an offer of what he expected to prove, which would indicate to the trial court the relevancy of the testimony, and, in the absence of such offer, the action of the court in rejecting the testimony will not be reviewed." Many of the rules of evidence are necessarily precise and technical. The purpose of these rules is to elicit the truth, and not to set traps for the unwary. When a question is asked that does not "indicate to the trial court the relevancy of the testimony," it is not error to exclude the testimony, unless the party propounding the question informs the trial court as to the relevancy of the testimony, and an offer of proof, that is, a statement of the nature of the evidence sought by the question, will enable the trial court to determine whether the evidence is competent. This rule is sometimes, though rarely, enforced in cross-examination. When the condition of the rec-

In re Estate of Johnson.

ord and the form of the question itself shows that it is relevant and competent, no offer of proof is necessary. The many decisions of this court in regard to requiring an offer of proof should be so understood.

In *Isaac v. Halderman*, 76 Neb. 823, it was said by COMMISSIONER DUFFIE: "No right of the citizen is more valued than the power to dispose of his property by will. No right is more solemnly assured to him by the law. Nor does it depend in any sense upon the judicious exercise of that right. It rarely happens that a man bequeaths his estate to the entire satisfaction of either his family or friends. The law wisely secures equality of distribution where a man dies intestate, but the very object of a will is to produce inequality and to provide for the wants of the testator's family, to protect those who are helpless, to reward those who have been affectionate, and to punish those who have been disobedient. * * * He is entitled to the control of his property while living, and by will to direct its use after his death, subject only to such restrictions as are imposed by law." This, of course, is true if the document presented is in fact the will of the testator. The object of the trial is to ascertain whether it is his will, or is rather the will of those around him who seek to obtain the property for themselves.

When a man realizes that he is stricken with a fatal disease, a disease which causes excruciating suffering and must destroy his life in a short time, no matter how strong a man he may have been in health, he clings nervously to those of his relatives who may be around him. They represent to him all of the earthly support he has. If he alienates them, he must face the "King of Terrors" alone so far as things of earth with which he is familiar are concerned. And he is not always in a position to resist their influence. To take advantage of such a situation to have a brother unjustly disinherited is a fearful act, and yet it too often happens. The question then is whether the result is the will of the

In re Estate of Johnson.

deceased, or the will of those who surround him when the details are arranged. This question frequently places a difficult and embarrassing duty upon courts and juries. There can be no doubt that the testimony of Edward, offered in behalf of the proponents, was intended to rebut the conclusions indicated by the circumstances in evidence, that he had assisted in so influencing his father. There should have been the freest cross-examination in regard to the consultation on the Sunday preceding the execution of the proposed will, and the conduct of this witness generally as indicating whether he had attempted to influence the father to disinherit Charles and the children of another son deceased. The trial court erred in refusing to allow such cross-examination.

Albert Johnson, testifying for the contestants, was asked: "Q. On or about this time, Mr. Johnson, did you have any conversation with your father concerning the provisions of the will in so far as they related to your brother Charley? A. Yes, sir. Q. What was said at that conversation?" This was objected to, and the objection sustained. The contestants then offered "to prove by this witness that at this conversation the father stated to the witness that he had always wanted to give Charles something, but that he was no longer his own boss, and had been prevented by the boys from doing so." The objection was still sustained, and the contestants excepted to the ruling. Such evidence, it is almost universally held, is not competent as substantive proof of undue influence; but, if the proponent had declared "that he had always wanted to give Charles something," evidence of that fact was competent as tending to show the condition of his mind and feeling toward Charles, and that part of the evidence offered should have been allowed.

The court also erred in striking out evidence as to the result of taking over Charles' farm by his father.

In re Estate of Johnson.

The court instructed the jury that "influence that amounts to undue influence must be such as to compel, overpower, and coerce one to do something which he does not want to do," and also that if they "find from a preponderance of the evidence that the proponents, Arthur G. Johnson, Ed. H. Johnson, Hardie L. Johnson, and Anna Lovisa Johnson, or some of them, exercised such influence over him at the time of signing the will that he was forced, coerced, and compelled against his will and against his judgment, * * * then and in that event said will would be executed under undue influence." This language was substantially repeated in other instructions. Under some circumstances, if it was contended that the testator had been threatened with bodily injury and through fear of such physical injury had been compelled to execute the will, then such language as this might be appropriate in the instructions to the jury. It was decided by the supreme court of Alabama that, where the principal legatee had occupied a confidential relation to testator, the burden is on him to show the absence of the exercise of undue influence. *Moore v. Spier*, 80 Ala. 129. When a party to be benefited by the will has the controlling influence in its formal execution, it is considered by the supreme court of Iowa to require close scrutiny and full explanation. *In re Will of Donnelly*, 68 Ia. 126. The decedent, knowing that he was stricken with a fatal disease and that he could not live long, was surrounded by these four or five persons who are the beneficiaries under this proposed will, with whom he was living and upon whom he depended for support and consolation in his last hours, and under such circumstances it was not necessary that force, coercion, and compulsion should be used in order to amount to undue influence.

It is complained that the court instructed the jury that, unless they were convinced by a preponderance of the evidence that there was undue influence, they could not reject the will on that ground. There is some

Kriss v. Union P. R. Co.

merit in this complaint. If there was a preponderance of the evidence of undue influence, it would be sufficient to establish that fact, and the language of this instruction might allow the jury to remain still unconvinced, although there was such preponderance of evidence. When it appears from other instructions given and from the manner of the trial that the jury were probably misled by such an instruction, it will be held to be prejudicial.

It seems that the county court in admitting the proposed will to probate found that it had been altered since its execution. This was an appeal from that decision to the district court, and upon such appeal the district court tries all questions *de novo*. No question as to the alteration appears to have been submitted to the jury, and we are not referred to evidence in the record upon which the court acted in admitting the proposed will in evidence. This matter is not made very plain in the briefs, and it is difficult to tell what are the contentions of the parties in that regard.

For the reasons stated, the judgment of the district court is reversed and the cause remanded for further proceedings in that court.

REVERSED.

LETTON, ROSE and HAMER, JJ., not sitting.

ELIZABETH L. KRISS, ADMINISTRATRIX, APPELLEE, v. UNION
PACIFIC RAILROAD COMPANY, APPELLANT.

FILED FEBRUARY 5, 1917. No. 19065.

1. **Appeal: ARGUMENT OF COUNSEL: FAILURE TO OBJECT.** The general rule is that counsel cannot remain quiet and seemingly acquiesce in remarks of opposing counsel in his argument to the jury, and after verdict obtain a reversal because of matters not objected to at the time.
 2. **New Trial: ARGUMENT OF COUNSEL: FAILURE TO OBJECT.** When counsel in his argument to the jury assumes that prior remarks
- 100 Neb.—51

Kriss v. Union P. R. Co.

of opposing counsel justify and make necessary the reply which he is making thereto, opposing counsel may by objection take the ruling and instructions of the court thereon. If he makes no objection and appears to acquiesce in the assumption of counsel, he will not after verdict ordinarily be granted a new trial because of alleged impropriety of his opponent's argument.

3. **Stipulations: WITHDRAWAL.** When in the course of a jury trial the parties agree upon two stipulations, one of which tends to increase the amount of the plaintiff's claim and the other tends to diminish it, neither party should be allowed, after the cause has been submitted to the jury upon such stipulations, to withdraw the stipulation against his interest and enforce the other.
4. **Trial: REFUSAL OF INSTRUCTIONS.** When the trial court gives a general instruction upon a matter involved in the issues, and a more specific instruction is requested, such request should fairly present the matter as it affects all parties to the litigation. If it fails to do so, to refuse the request will not be prejudicial error requiring a reversal, unless it appears from the entire record that the jury probably misunderstood the real issue for want of a more specific instruction.
5. **Damages: REMITTITUR.** In an action for damages, the burden is upon the plaintiff to prove by a preponderance of the evidence each element of damage sustained. If it appears that the verdict includes an item of damage not so proved, a remittitur will be required.

APPEAL from the district court for Douglas county:
GEORGE A. DAY, JUDGE. *Affirmed on condition.*

Edson Rich and A. G. Ellick, for appellant.

Sullivan, Rait & Thummel, contra.

SEDGWICK, J.

The plaintiff, as administratrix of the estate of her deceased husband, John J. Kriss, brought this action in the district court for Douglas county to recover damages for the alleged negligence of the defendant causing the death of the decedent. She recovered \$18,137.16, and the defendant has appealed.

The decedent lost his life in a collision of two of the trains of the defendant, and the defendant submitted the case to the jury, conceding its liability, and contesting only the amount of the recovery.

The principal ground urged by the defendant for a reversal is the misconduct of the plaintiff's attorney in his closing address to the jury. The plaintiff's attorney, among other things, urges that his remarks complained of were induced by the prior remarks to the jury by the defendant's attorney. These respective attorneys are, and long have been, among the leading and influential members of the bar of this state, and, from the view that we take of this record, we are fortunate in not being required to comment upon the propriety of the language complained of. The address to the jury of the defendant's attorney is not in the record; but the plaintiff's attorney insists that the character of his address sufficiently indicates the conditions which he was required to meet as brought on by the defendant's attorney. No objections were made to the remarks complained of, and no rulings of the court were asked thereon by the defendant's attorney. Under ordinary circumstances, the general rule is that counsel cannot remain quiet and seemingly approve of what is being done, or at least to acquiesce in it, and afterwards obtain a reversal of the case because of matters not objected to at the time. The exception to this rule in cases of this kind is well stated by SULLIVAN, J., in *Chicago, B. & Q. R. Co. v. Kellogg*, 55 Neb. 748: "We do not, however, wish to be understood as holding that a rebuke from the court, or even a complete retraction by the offending counsel, is in all cases of this kind a sovereign remedy. If the transgression be flagrant—if the offensive remark has stricken deep, and is of such a character that neither rebuke nor retraction can entirely destroy its sinister influence—a new trial should be promptly awarded, regardless of the want of an objection and exception." The address of plaintiff's attorney to the jury is quoted at length in the record, and it appears that he continually assumed, at least in this address, that the condition of the record and the prior remarks of the defendant's attorney justified the language which he was using. If a seasonable

objection had been interposed to these remarks, this question of justification in using them would necessarily have been presented to the court, and the decision thereon of the learned judge who tried this case would have carried great weight with this court, and the determination of the trial court as to the rights of the respective counsel and the propriety of the remarks complained of would, without doubt, have been regarded and complied with by all counsel interested in the case. We think that without regard to the general character of these remarks, which appear to have run through the entire address, the defendant is not now in a position to ask for a reversal of the judgment on these grounds.

The question whether the judgment is excessive remains to be considered. The defendant contends that the damages allowed by the jury were augmented by an error of the court in an instruction to the jury. The court prepared instruction No. 11 to be given to the jury, in which he told the jury: "To enable you to better understand the method of arriving at the present worth of a given sum, the court gives you an illustration by way of example: If it was desired to find what the present worth of \$100 due in one year on the basis of money being worth $5\frac{1}{2}$ per cent. (the amount agreed on by the parties for the purposes of this case), you would divide \$100 by \$1.055, that being the interest on \$1 for one year plus the \$1. The result of such division would be \$94.78 plus, which is the present value of \$100 due in one year. If \$100 is due in two years, on the basis of $5\frac{1}{2}$ per cent. the present worth would be found by dividing \$100 by \$1.11; the \$1.11 being the interest for two years plus the \$1. For the period of three, or subsequent years, the present worth may be found by applying the same rule. The aggregate of these sums for the different periods would be the present worth." The parties entered into a stipulation: "It is agreed that neither party will except to the formula as a basis upon which to figure the present worth as given by the court in

Kriss v. Union P. R. Co.

its instruction No. 11." After the jury had considered the case for some time, they sent to the court an inquiry in writing: "Honorable Judge—Sir: Please give us, the jury in this case, the present value of \$31,620, and oblige the jury. Ed Porter, Foreman. P. S. Life expectancy 31 years at \$85 per month. E. P." It appears from the request for information submitted by the jury that the jury had already determined the expectancy of the decedent, and the amount of his contribution to the support of the widow and her children. It was when the counsel attempted to estimate the present worth of the sum indicated by the jury upon the basis of the court's instruction No. 11 that the question arose. Thereupon the defendant's counsel asked to withdraw from the agreement not to except to instruction No. 11 containing the formula, and asked for time to prepare a showing in support of the application. The court denied "the right to make any further showing at this time," because the jury, after having deliberated for some time, had agreed upon the facts necessary to a complete verdict, and had merely asked for instruction as to the legal method of calculating the amount of the present worth. It was also stipulated by the parties: "That in figuring the present worth of a given sum to be paid in annual instalments in the future the jury may base their calculations upon the rate of $5\frac{1}{2}$ per cent."

The plaintiff's counsel contends that the rate of interest at $5\frac{1}{2}$ per cent. is altogether too large, and that, if the stipulation in regard to the formula for computing the present worth was withdrawn and the correct rule for such computation was given to the jury, the stipulation fixing the rate of interest at $5\frac{1}{2}$ per cent. ought also to be changed. There is evidence in the record that these two stipulations were both agreed upon during the trial of the case and that one is the consideration for the other. This evidence, so far as we have observed, is not denied. There is room for a difference of opinion as to the rate of interest that may be obtained upon investments.

There is evidence tending to show that the rate of 5½ per cent. is altogether too large. Because of these two stipulations the plaintiff neglected to produce evidence as to the proper rate. It may be that if the correct rule of computing the present worth had been given to the jury, instead of the rule agreed upon as announced in instruction No. 11, and evidence had been taken as to the usual rate of interest upon such investments, the result would have been substantially the same; that is, it seems to have been assumed by counsel that one stipulation would offset the other, and perhaps they were not far wrong in so considering. At all events, the court was right in refusing to allow one stipulation to be withdrawn and the other to stand.

The defendant asked the court to instruct the jury that the "children at a certain age may become self-supporting and would not have received any pecuniary benefit from the said John J. Kriss at that time had the said John J. Kriss lived," and, that "you are entitled to consider whether or not the annual earning power of the said John J. Kriss near the end of his probable life expectancy would be as great as it was at the time of his death, and as to whether or not the amount that he would probably contribute to the support of his wife and children would have been as great near the end of his life expectancy as it was at the time of his death." The instructions given by the court were general and contained the following: "In considering this, it is proper for you to consider the age of the deceased, and the age of his widow and children, and from all the facts and circumstances proved determine what sum the deceased would probably have contributed to the financial benefit of his wife and children during the remainder of his life had he lived." It would have been quite proper to have informed the jury that decedent's earnings might have increased or decreased, and that the children might have become more or less dependent upon their father as time went on. But this seems to

Kriss v. Union P. R. Co.

have been made clear to the jury during the trial, and the instructions-requested did not so fully state the propositions as to make them competent without further instructions. We do not think it is so clear that the refusal of this request was prejudicially erroneous as to require a reversal.

Decedent was earning \$110 a month. The jury found that he would devote \$85 to the support of his family and \$25 to his own support. From a computation, taking the amount they allowed the widow as a basis, they must have found that something over \$50 a month would be devoted to her support. The evidence will not justify the finding that more would be devoted to the support of the widow than to the support of the deceased himself. If we conclude that the amount that would be devoted to the support of the children is correctly found, then \$75 a month would be devoted to the support of the widow and the decedent, \$37.50 each. The amount found in favor of the widow, \$10,137.16, is at least 25 per cent. too large.

If the plaintiff remits \$2,534.29 from the judgment in favor of Elizabeth L. Kriss within 30 days, the judgment will be affirmed; otherwise, the judgment will be reversed and the cause remanded for a new trial as to the recovery in behalf of Elizabeth L. Kriss. The court will allow either party to withdraw from the two stipulations stated.

JUDGMENT ACCORDINGLY.

HAMER, J., dissenting.

I am unable to agree with the views expressed in the majority opinion, and feel called upon to register an earnest dissent.

I have read eloquence all my life and generally with much admiration. An examination of the speech of senior counsel for the plaintiff shows rare ability. Counsel talks most eloquently, I might say most seductively, of facts not shown by the testimony in the case.

The question to be tried was whether there was negligence upon the part of defendant's servants which resulted in the death of plaintiff's decedent. Counsel first said that no corporation could have either the virtue or benevolence that counsel for the defendant would "want you to think it possesses. I admire virtue wherever I see it, and virtue is worthy of reward, but, gentlemen, I am not willing that they should be compensated for their virtue at the expense of this woman and her five children." This is followed by the statement that notwithstanding the fact that counsel were very sorry, yet, nevertheless, "why did they kick us down stairs." Again this is followed by a statement that in times gone by the value of a human life was limited to the right to recover \$5,000. Then comes the statement that the corporations put that law upon the statute book. I have not noticed any testimony of that kind in the record. Afterwards comes the consideration of something which counsel for the plaintiff say does not permit a recovery. "These children will miss their father, they will miss his friendly assistance in preparing them for life's battle. Who can estimate the value of it? Money won't measure it. All the counsel and moral instruction, advice and help and the encouragement that a good father can give to his children, that is gone, gentlemen, and they can never have it. We ask nothing for that because the law don't give compensation for that loss, great as it is; we get nothing for that." Of course, the purpose was to excite sympathy for the plaintiff and the children by this sort of a reference. Soon this is followed by a statement that one of the counsel for the plaintiff used to receive for his services only \$1,200 a year. Counsel estimated that five years before this trial the particular counsel had only been receiving 60 per cent. of what he was then getting. The next picture in the panorama was of the manager of the railway company as a brakeman with a brakeman's salary. Then came a picture of the president of the company when he

Kriss v. Union P. R. Co.

was a telegraph operator and was alleged to be earning \$75 a month. Then the jury were told that the manager's salary was \$25,000 a year, while the president was drawing \$50,000 a year. Then came the picture of another railroad man alleged to have been a brakeman on another railroad, but who was now claimed to be the owner of untold millions. Examination of the record and briefs will show that the rhetoric and literature of counsel for the plaintiff was seemingly inexhaustible on the subjects that were *not* before the court, and with which the jury had nothing whatever to do.

In *Chicago, B. & Q. R. Co. v. Kellogg*, 54 Neb. 127, counsel for Kellogg in his argument to the jury after the close of the testimony said, among other things: "The defendant company forces its parasites to swear in its behalf. The employees of the defendant are surrounded by superintendents and assistant superintendents, who hold them by the neck and say to them: 'Oh, how easy I can drop you, how easy I can drop you!'" This court said: "That the language is totally unwarranted by the record and not within the range of the legitimate inferences and deductions which might be drawn from the evidence; that it was calculated to arouse the passions and prejudices of the jury, too easily excited in cases like this, and instead of assisting them to calmly inquire as to whether the plaintiff below had been injured through the negligence of the railway company, and, if so, the extent of such injury and what amount of money would compensate him therefor, and render a verdict accordingly, this language was calculated to inspire the jury with a desire to punish the railway company for the injury which its negligence had inflicted upon the plaintiff. That these poisonous shafts of fiery invective did their work we think is manifest from the amount of the \$9,000 verdict which the jury did render. Judgments have been often assailed in this court because of the alleged misconduct of counsel for the parties in whose favor the judgments were ren-

dered." A large number of authorities are cited in support of this position. It is then said: "These cases establish that a lawyer charged with the conduct of a case is invested with certain rights and charged with certain duties. It is his duty to use all honorable means to protect his client's interests; and in argument, within the limits of the evidence and the legitimate deductions and inferences to be drawn therefrom, he may not be limited, but may comment on the conduct and credibility of witnesses and parties to the suit. On the other hand, he must act honorably and fairly with the court, opposing counsel, the jury, and the parties to the litigation. But he may not, in his conduct of the case or in his argument to the jury, go outside the record, the evidence, and the legitimate inferences deducible therefrom, and ask questions, make statements or arguments for the purpose of misleading and prejudicing the jury; and if he does so, such misconduct, if properly preserved in the record and assigned here, will cause a reversal of the judgment procured."

In that case no relief was given at the first hearing, but there was a rehearing, and a rather elegant criticism of the conduct of counsel for the plaintiff was placed in 55 Neb. 748. There this court said: "Had the court, in response to a proper objection, vigorously condemned the remarks of counsel, we think they would have left no prejudicial impression on the minds of the jury. By prompt action the defendant's counsel might have obtained an effective antidote for the poison in Shaffer's speech; but he failed to act, and is, therefore, not in an attitude to have his complaint now considered. We do not, however, wish to be understood as holding that a rebuke from the court, or even a complete retraction by the offending counsel, is in all cases of this kind a sovereign remedy. If the transgression be flagrant—if the offensive remark has stricken deep, and is of such a character that neither rebuke nor retraction can entirely destroy its sinister influence—a new trial

should be promptly awarded, regardless of the want of an objection and exception." The true rule could not possibly be more aptly expressed than in the language above quoted. It is certainly true that, when counsel winces and dodges under the blows of his adversary, the jury takes sides, and they are not for the man who runs away or who claims protection. The people like a fighter and they despise a coward. If the counsel who is attacked calls on the court for help, then the jury are likely to say, "Well, he knew where the shoe pinched, didn't he?" or, "He got it in the neck and hollered, 'Ouch'," or, "He knew when he was licked." The number of expressions that might be used by the jury under these circumstances is simply unlimited. The only adequate remedy is to give counsel on the other side "hot stuff." When it is apparent that the verdict rendered by the jury is wrong, then it becomes the duty of a reviewing court to give a new trial or to cut down the judgment to reasonable limits. That is what was done in the case last cited. This court apparently did not like to establish a rule that it would in such case set aside the verdict and grant a new trial, but it reversed the judgment unless the plaintiff would remit \$2,500. The court said: "In view of the condition of the record, we are not warranted in reversing the judgment on account of misconduct of counsel; but we have concluded, after a through consideration of the evidence, that the damages are excessive, and must have been assessed while the jury were yet under the sway of counsel's superheated eloquence." The particular member of this court who wrote the language quoted knew what he was about, and this court seems to have fully indorsed what he did, because there is no dissent.

In *Ashland Land & Live Stock Co. v. May*, 51 Neb. 474, counsel for the plaintiff said to defendant's counsel: "He (referring to defendant's witness then on the stand) has been to you; of course, you fixed him; you have to depend upon fixing witnesses." The trial judge appears

in that case, as stated in the opinion, to have some of the time sustained the objections of counsel for the defendant, but at other times he failed to make any ruling, nor did he rebuke counsel for the plaintiff. This court reversed the judgment of the district court and said: "The misconduct of counsel for the prevailing party in this case could not have been otherwise than prejudicial to the defendant, especially in view of the conflicting character of the evidence."

In *Stratton v. Nye*, 45 Neb. 619, counsel for the defendant in his opening statement to the jury said: "W. A. Nye in 1889 was the owner of one-half interest in a corn sheller, in connection with Robert Gilchrist; that some time in July of that year he sold that half interest to Mr. Gilchrist, and after this he came to town and mortgaged the same half interest which he had sold to Mr. Gilchrist." In that case CHIEF JUSTICE NORVAL delivered the opinion of this court. He said in the opinion: "In such opening statement it is the duty of counsel to refrain from rehearsing irrelevant and prejudicial matters or facts which are foreign to the issues; and, where counsel abuses the privilege of advocacy in his opening by rehearsing irrelevant and prejudicial matters, the court should, especially when objection is made, reprove the practice in the hearing of the jury, and as far as possible remedy the mischief by instructing the jury to disregard the prejudicial statement. The trial judge must necessarily have a broad discretion in such matters; but, if counsel abuse their privilege, or the trial court its discretion, to the prejudice of a party, it is sufficient ground for a reversal of the case."

In *Hennies v. Vogel*, 87 Ill. 242, the supreme court said: "It is the duty of the circuit court, in conducting trials by jury, to restrain every effort of the parties to bring before the jury matters which are foreign to the issues to be tried, and especially and scrupulously to exclude all such matter when the same has a tendency to excite the prejudices of the jury against a party to the

Kriss v. Union P. R. Co.

issue." In that case there was a petition for a rehearing, "on the consideration of which, we became satisfied that the damages found by the jury were excessive, and a rehearing was accordingly granted." Then the court went over the whole case on the rehearing. It was said PER CURIAM: "The majority are satisfied that they (the damages) are out of all proportion to the injury inflicted." The judgment was reversed and the cause remanded.

In *Tucker v. Henniker*, 41 N. H. 317, it was said in the body of the opinion: "No fault of the opposite counsel could justify a repetition of that fault by his opponent. The jury are sworn to render a true verdict in every case, according to law and the evidence given them, and the well-established rule of judicial proceedings confines the arguments of counsel before them to comments upon and suggestions in relation to that law and evidence. * * * It is irregular and illegal for counsel to comment upon facts not proved before the jury as true, and not legally competent and admissible as evidence." The verdict was set aside, and a new trial granted.

In *Martin v. State*, 63 Miss. 505, the prosecuting attorney said: "Martin is a man of bad, desperate, and dangerous character. But I am not afraid to denounce the butcher boy, although I may, on returning to my home, find it in ashes over the heads of my defenseless wife and children." The court said: "The prisoner was on trial for a specific offense, and it was his right under the law to be tried for that offense, upon competent evidence confined to that issue. We are of opinion that the counsel for the prosecution in the matter above quoted, passed the bounds of legitimate advocacy, and that, under the circumstances of the case, the prisoner may have been, and probably was, thereby injured. Such declarations uttered by distinguished counsel, of high moral and social standing, in any case, would inevitably tend to prejudice the jury against the prisoner." The

judgment was reversed because of the argument of counsel.

In *Rudolph v. Landwerlen*, 92 Ind. 34, counsel for the plaintiff said in his closing argument: "It is in evidence that this defendant is a Catholic priest, and all of his witnesses are members of his church, and it is a strange coincidence that they track the evidence of the defendant with that minuteness and precision in the use of words and language that cannot be accounted for, except, as shown by the evidence, they heard the defendant from the pulpit detail his version of the case, and they can come here and swear to his version of the case, and the defendant can absolve them from the sin. If it is one of the doctrines of the Catholic church that one of the members may swear falsely as a witness, and the priest can forgive him his sin for such false swearing, so as to absolve him from all moral guilt, it is the privilege and duty of the jury" to consider this. The court sustained an objection, and the same counsel proceeded: "The defendant is here, and, if it is not a doctrine of the Catholic church, let him stand up here and deny it, and that shall be the end of it." The trial court refused a new trial, but a new trial was granted by the supreme court, whereupon there was a petition for a rehearing. It was overruled, and the court said: "We adhere to the conclusions reached in our original opinion."

In *Coble v. Coble*, 79 N. Car. 589, counsel for the plaintiff said: "That no man who had lived in defendant's neighborhood could have anything but a bad character; that defendant polluted everything near him, or that he touched; that he was like the upas tree shedding pestilence and corruption all around him." There was a new trial.

I have been unable to find in the bill of exceptions any sort of justification of the remarks made by counsel for the plaintiff. It is said in the majority opinion: "The plaintiff's attorney, among other things, urges

that his remarks complained of were induced by the prior remarks to the jury by the defendant's attorney." There is nothing said in the record or in the opinion concerning the substance of these "prior remarks." It is further said in the opinion: "These respective attorneys are, and long have been, among the leading and influential members of the bar of this state, and, from the view that we take of this record, we are fortunate in not being required to comment upon the propriety of the language complained of." I quite agree with the majority opinion touching the fact that the respective attorneys are "among the leading and influential members of the bar of this state," but, notwithstanding that fact, I do not see how I can conscientiously avoid making this dissent. The high social and professional standing of these gentlemen seems to the writer to have nothing to do with the subject.

One may readily understand how statements like the foregoing, which, for lack of space are not set forth in their entirety, might influence a jury, although not in any way material to the case on trial, and wholly unsupported by the evidence. This is especially true when the counsel using the language here employed is a man of fine standing in the community, of sterling integrity, of much more than average scholarship, and possesses in addition a pleasing personality along with much charm of manner and rare powers of expression, both literary and legal. The majority opinion treats the offense mildly and imposes no punishment by compelling the plaintiff through the use of a remittitur to reduce the judgment to reasonable limits. A reduction of one-third might not be out of the way in view of the pictures drawn and the seductive, impassioned, and prejudicial language used. Then other counsel by the rule which the majority opinion establishes, in other cases yet to be tried, are invited to draw pictures, on one side, of wealth, and, on the other side, of penury. In the next case that may be tried against a railroad com-

pany for damages because of personal injuries this case will be referred to. It is cases of this kind where the courts are called upon to preserve the rights of litigants, however unpleasant it may be to punish counsel through their clients in the way suggested. The high standing of a lawyer socially and professionally, and the fact of his exceeding good fellowship, but emphasizes the necessity for a proper observance of rules which should not be broken.

I have no attempted criticism to make of the plaintiff's right of recovery if the case had been fairly tried under proper instructions. But where this court permits counsel in the court below, while making his closing address to the jury and after he is safe from reply, to discuss the humble origin of counsel for the defendant, the small fees they received early in their professional life, the supposed fees that they receive now, the fact that the manager of the defendant company was once a brakeman and its president once a telegraph operator, and that each now receives an immense salary, and counsel then closes with a peroration touching a millionaire never connected with the defendant railroad company and not in the railroad business for half a lifetime, and all this is done without criticism or condemnation upon the part of this court, which says it may be done again under like circumstances, I feel that I am compelled to protest. The district court should have stopped the plaintiff's counsel at once, whatever the charm of his voice, whatever his wit or his humor, however graphic the pictures he drew, and however high his standing as a citizen and at the bar. As defendant's case was damaged, there should be a new trial.

I do not consider that the record in any way justifies the second paragraph in the syllabus.

As to the fourth paragraph in said syllabus, it does not attempt to state in what way the instruction requested by defendant's counsel was deficient, and if no fact, or no absence of testimony concerning supposed

Adams v. McGrew.

facts are referred to, then there is nothing to consider. It seems to the writer that the paragraph should be cut out.

GEORGE WHITNEY ADAMS ET AL., APPELLEES, v. R. V.
MCGREW, APPELLANT.

FILED FEBRUARY 5, 1917. No. 19109.

1. **Fraud: IMPUTED NOTICE.** Although the defendant may have had no direct actual knowledge of the fraud and misrepresentation of a third party who procures an exchange of valuable land for worthless corporation stock of the defendant, still the law may impute such notice to him from circumstances strongly indicating it, if he received title to the land and disposed of it for his own profit.
2. ———: ———. In such case, if it clearly appears that false representations were made inducing the exchange, and the circumstances are such that the law will impute to defendant notice of that fact, he will be liable to plaintiff for the value of the land so obtained, and the jury should be so instructed.
3. **Appeal: IMMATERIAL ERRORS.** If under the competent evidence the only question for the jury is the value of the land, errors of the trial upon other issues become immaterial.
4. ———: **REMITTITUR.** And in such case, if the amount of the verdict and judgment is clearly more than the evidence warrants, a remittitur will be required as a condition of affirmance.

APPEAL from the district court for Franklin county:
HARRY S. DUNGAN, JUDGE. *Affirmed on condition.*

W. C. Dorsey and A. H. Byrum, for appellant.

W. H. Miller, George S. Redd and George A. Adams,
contra.

SEDGWICK, J.

The plaintiffs brought this action in the district court for Franklin county to recover damages against the defendant for fraud and deceit in an exchange of corporation stock of the defendant to the plaintiffs for an equity in a piece of land in Colorado. There was a verdict and judgment for the plaintiffs, and the defendant has appealed.

The defendant had 200 shares of the capital stock of the National Realty Company, a Colorado corporation. The plaintiffs, through one Maloney, exchanged their equity in 120 acres of land for this stock. The evidence shows that Maloney misrepresented the value of the stock, and it also shows that the corporation was fraudulent and that the stock was entirely worthless. In January, 1911, the defendant purchased some of this stock and paid \$1,000 therefor. He then became vice-president of the corporation and remained connected with the corporation in that capacity for perhaps ten weeks. He then resigned his office in the corporation and ceased any active management or participation in the business. Shortly afterwards Mr. Maloney asked the defendant if he still had the stock in the corporation and if he wanted to sell or trade it. The defendant told Maloney that he still had the stock and would trade it. It appears that these plaintiffs had employed Maloney as their agent to dispose of their equity in the land in question by sale or trade, and Maloney induced the plaintiffs to execute a contract of exchange of their interest in the land for the stock in question. He then presented the contract to the defendant, who also signed it. The principal question in the trial was whether the defendant was responsible for the misrepresentations of Maloney and of the parties to whom Maloney sent the plaintiffs for information in regard to the value of the stock. The defendant was a witness in his own behalf and his testimony seems to be straightforward and reliable. He made no attempt to deny his former relations with the company. He knew that the corporation was fraudulent and insolvent, and that the stock was entirely worthless. From his testimony it would appear that he was swindled when he obtained the stock, and that he must have known that Maloney contemplated a swindle when he disposed of it; and, while we must believe from this evidence that the defendant had no direct actual knowledge of the particular misrepresenta-

Adams v. McGrew.

tions that Maloney and others made to the plaintiffs, yet there are many circumstances in the evidence of the defendant himself, as well as other witnesses, from which the law will impute notice to the defendant that Maloney was using improper methods to dispose of the stock. The evidence is so strong upon this point that a finding to the contrary could not be supported. Under this evidence the court would have been justified in submitting to the jury the one question as to the value of the property that the defendant received in exchange for the stock. It is therefore unnecessary to consider alleged errors of the court in the trial of other issues.

The important question in the case then is whether the evidence will support so large a verdict and judgment. The defendant took the title subject to a mortgage for \$4,450, upon which there had accumulated at least \$100 interest and taxes. This interest and taxes the defendant paid. The evidence was conflicting, but not very satisfactory, as to the value of the land. There is no evidence of disinterested witnesses as to its value. We have only the evidence of one of the plaintiffs and the evidence of the defendant. Neither shows any special knowledge as to value. Taking their evidence together, and considering that the burden of proof was upon the plaintiffs to show affirmatively the value of the property they parted with, it cannot be said that this evidence proves the land was worth more than \$7,500. If we deduct the incumbrances, \$4,550, the most that the evidence will warrant as a judgment against the defendant would be \$2,950. The verdict was \$5,866.25, which exceeded the value of the interest conveyed to the defendant by at least \$2,916.25. If the plaintiff enters a remittitur of \$2,916.25 within 30 days, the judgment of the district court will be affirmed; otherwise it will be reversed. Costs in this court will be taxed against the plaintiffs.

AFFIRMED ON CONDITION.

LETTON, J., not sitting.

MODERN WOODMEN OF AMERICA, APPELLANT, v. WALTER BERRY, GUARDIAN, APPELLEE.

FILED FEBRUARY 5, 1917. No. 19100.

1. **Insurance: FORFEITURE: WAIVER.** "A forfeiture incurred by the holder of a life insurance policy or contract is waived, if the company, with knowledge of the facts, subsequently collects premiums, dues or assessments on account of the contract, and retains them without objection until after the death of the insured." *Modern Woodmen of America v. Colman*, 68 Neb. 660.
2. **Principal and Agent: NOTICE TO AGENT.** "It is the duty of an agent to make known to his principal all facts concerning the service in which he is engaged that come to his knowledge in course of his employment, and this duty he is, in a subsequent action between his principal and a third person, conclusively presumed to have performed. This is the foundation of the rule, necessary to the public safety, that notice to an agent in the course of his employment is notice to his principal." *Modern Woodmen of America v. Colman*, 68 Neb. 660.
3. **Insurance: PROHIBITED OCCUPATIONS.** A decedent who had not been employed and who had not received compensation as a bartender, though he may for another occasionally have waited upon the customers of a saloon as an accommodation to the proprietor, was not a saloon bartender within the meaning of the prohibitive provision of the contract between plaintiff, a mutual benefit insurance society, and the insured.
4. **Trial: MOTIONS FOR DIRECTED VERDICT: FINDING OF COURT.** Where, at the close of the trial of a law action, each party moves for a directed verdict, the motion of one of the parties being sustained, the finding of the court takes the place of a verdict by the jury and will be so treated on appeal.

APPEAL from the district court for Seward county:
EDWARD E. GOOD, JUDGE. *Affirmed.*

T. S. Allen, Truman Plantz and J. J. Thomas, for appellant.

Norval Bros. and B. F. Good, contra.

DEAN, J.

This action was begun by plaintiff against defendant, Walter Berry, guardian, in the district court for Seward

county, to recover \$3,000 paid by plaintiff to defendant in pursuance of the terms of a beneficiary certificate in that amount that had been issued by plaintiff to Zack Berry, the insured, father of Walter G. Berry, his minor son, the ward of defendant. Recovery is sought on two grounds: First, that the insured had violated the terms of his application for membership, the by-laws of the order, and the terms of the beneficiary certificate by having engaged in a prohibited occupation, namely, that of selling intoxicating liquors as a saloon bartender after he had become a member of the society; and, second, because the \$3,000 named in the policy was obtained from plaintiff by the deceit and fraud of defendant, in that the fact of Zack Berry's having been engaged in the prohibited occupation was by the defendant concealed from plaintiff by the use of false and fraudulent statements and affidavits in the proofs of death that were submitted to plaintiff. To properly dispose of the issues involved, we find it necessary to consider only the first ground of plaintiff's contention. In the trial court the suit was dismissed and judgment rendered in favor of defendant on a directed verdict, and plaintiff appeals.

At the close of the testimony both parties moved for a directed verdict. Plaintiff's motion was overruled. Defendant's motion was sustained. For the purpose of review, the action is thus brought within the rule which provides that, where at the close of a trial in a law action both parties move for a directed verdict, and the motion of either party is sustained, the findings of the court in such case upon questions of fact have the same force and effect that the verdict of a jury would have on like questions, and will be so regarded upon appeal to this court. *Dorsey v. Wellman*, 85 Neb. 262; *Martin v. Harvey*, 89 Neb. 173; *Krecek v. Supreme Lodge, F. U. A.*, 95 Neb. 428. The pertinent facts upon which plaintiff relies for reversal appear in the discussion following.

Zack Berry, the insured, became a member of the plaintiff society in February, 1899, while engaged in the occu-

pation of farming. He died on May 3, 1914. The required dues and assessments of the order had been paid by him yearly in advance, and at the time of his death all that were due or to become due until January 1, 1915, had been paid. Some time after Berry became a member of the society, he quit farming and became manager of a telephone company, and at a later period, leaving that employment, he engaged in the real estate business. He was engaged in the three occupations named from the time that his membership began until sometime in the fall of 1911, a period of about 13 years, when he entered the employ of Louis Hartwig, a saloon-keeper at Seward, and as a subordinate in the Hartwig saloon engaged more or less actively for his principal in the sale of intoxicating liquors over the bar to the customers. His employment continued in and about the saloon until sometime early in 1913, when he was discharged, and he followed no other regular employment between that time and his death, being mostly occupied in assisting in the care of an invalid wife. It seems that the insured was at the saloon of Hartwig frequently between the time of his discharge and until shortly before he died, a period of a little over a year, and that during this time he occasionally assisted his former employer, who was his friend, in the sale of intoxicating liquors to the customers of the saloon, but for these services he received no compensation. Within a convenient time after Zack Berry died, proofs of his death were submitted to plaintiff by defendant on the usual blank forms furnished by the society, and soon thereafter, in pursuance of the terms of the policy, \$3,000 was paid to the defendant Walter Berry as guardian.

Zack Berry's application for membership, the by-laws of the society, and the beneficiary certificate or policy that was issued to him, together form the contract that is the basis of this suit. The application that is in evidence, among other things, provides that the applicant will conform to the by-laws then in existence or that

may thereafter be adopted, and that he will not, while a member of the order, engage in certain prohibited employments, among them being that of a wholesaler or manufacturer of liquors, saloon-keeper or saloon bartender, and that an engagement by him in any of the prohibited occupations will release the plaintiff society from liability upon the beneficiary certificate.

Section 5 of the beneficiary certificate in evidence provides: "If the member holding this certificate shall be expelled from this society or become intemperate in the use of alcoholic drinks, or in the use of drugs, or if he shall be or become engaged in the manufacture or sale of malt, spirituous, or vinous liquors as a beverage, in the capacity of proprietor, stockholder, agent, or servant, * * * then this certificate shall be null and void, and of no effect, and all moneys which have been paid, and all rights and benefits which may have accrued on account of this certificate, shall be absolutely forfeited, and this certificate become null and void."

The insured was regularly employed as a saloon bartender by Louis Hartwig, beginning in the fall of 1911, and his employment continued until the spring of 1913. And it is clearly in evidence that after he quit work in that capacity he was frequently at the saloon, sometimes as a patron, and when occasion presented sold intoxicants for his former employer over the bar, but he received no compensation for such services as he rendered in the saloon after he quit Mr. Hartwig's regular employ in the spring of 1913. Plaintiff argues that the fact of the insured having engaged in the prohibited occupation of a saloon bartender either for pay or gratuitously, after he became a member of the society, made his contract of insurance void.

In view of the decisions of this court and those of sister jurisdictions, the contention of plaintiff cannot be sustained. No other decision than that rendered by the trial court would have been right, in view of the record before us and of the authorities herein cited. Plainly

the plaintiff is bound by the knowledge of the local camp clerk, Borden, with respect to the employment of Zack Berry in a prohibited occupation, notwithstanding the contrary provisions in the application, the by-laws, and the certificate. To hold otherwise in view of the citations would be to ignore some of the elementary principles of agency. There is nothing in the record before us to show any collusion between Mr. Borden, the local camp clerk of plaintiff, and Berry, but the clerk is clearly shown to have had knowledge of his employment in the prohibited occupation at and before the time that the dues and assessments were collected. His knowledge is shown, not only by his own testimony, but as well by statements that he made to others on this subject some time before the beginning of the suit, and with which at the trial he was confronted. Mr. Borden seems to have acted within the scope of his authority. He accepted payment of dues and assessments tendered. In the present case he did so with knowledge of Zack Berry's occupation.

We adhere to the rule announced in *Modern Woodmen of America v. Colman*, 68 Neb. 660: "A forfeiture incurred by the holder of a life insurance policy or contract is waived, if the company, with knowledge of the facts, subsequently collects premiums, dues or assessments on account of the contract, and retains them without objection until after the death of the insured.

"It is the duty of an agent to make known to his principal all facts concerning the service in which he is engaged that come to his knowledge in course of his employment, and this duty he is, in a subsequent action between his principal and a third person, conclusively presumed to have performed. This is the foundation of the rule, necessary to the public safety, that notice to an agent in the course of his employment is notice to his principal."

The following cases in this and other jurisdictions seem fairly to support the rule invoked by defendant:

Modern Woodmen of America v. Berry.

Pringle v. Modern Woodmen of America, 76 Neb. 384, 388; *Modern Woodmen of America v. Lane*, 62 Neb. 89; *Knights of Pythias v. Withers*, 177 U. S. 260; *Distilled Spirits*, 11 Wall. (U. S.) 356; *Supreme Tent, K. M. W., v. Volkert*, 25 Ind. App. 627; *Order of Columbus v. Fuqua*, 60 S. W. (Tex. Civ. App.) 1020; *High Court, I. O. F., v. Schweitzer*, 171 Ill. 325; *McCormick v. Catholic Relief & Beneficiary Ass'n*, 39 App. Div. (N. Y.) 309; *Supreme Lodge, Knights of Honor, v. Davis*, 26 Colo. 252; *Supreme Council, C. B. L., v. Boyle*, 10 Ind. App. 301; *Modern Woodmen of America v. Breckenridge*, 75 Kan. 373; *La Dow v. North American Trust Co.*, 113 Fed. 13; *Downs v. Knights of Columbus*, 76 N. H. 165; *Callies v. Modern Woodmen of America*, 98 Mo. App. 521; *Richards*, Insurance Law (3d ed.) sec. 356; 1 May, Insurance (4th ed.) sec. 213.

Stevens v. Modern Woodmen of America, 127 Wis. 606, construes a by-law having substantially the same prohibitive provision with respect to a saloon bartender that is involved herein. It is there held that one who occasionally waited on customers in a combination restaurant and saloon and sometimes sold intoxicants as an accommodation to his employer, but without any compensation for the services so rendered in the saloon, is not a saloon bartender, even though his regular duties in and about the saloon were those of a chore boy.

Plaintiff cites *Krecek v. Supreme Lodge, F. U. A.*, 95 Neb. 428: The *Krecek* case is scarcely applicable to the case at bar for the reason that it therein appears that, "When the applicant for membership conspires with the secretary and others of the subordinate lodge to deceive the company and to withhold from it knowledge of facts disqualifying the applicant for membership, the presumption of knowledge of such facts on the part of the company is overcome." In the *Krecek* case the membership certificate of the applicant had been procured by the fraud of Krecek and the secretary of the local lodge who conspired together to deceive the lodge, and

State v. Standard Oil Co.

in the application for membership the statement was made that the applicant had not been engaged in a prohibited occupation, but such was not the fact. Krecek was a saloon-keeper when he made application. After his death the secretary, upon inquiry, frankly stated that the "purpose was to conceal the real facts." In that case, too, the case of *Modern Woodmen of America v. Colman*, 64 Neb. 162, and on rehearing, 68 Neb. 660, and *Pringle v. Modern Woodmen of America*, 76 Neb. 384, and, on rehearing, 388, are distinguished.

There is some conflict in the testimony, but the facts in dispute were passed on by the trial court, and there being sufficient testimony to support the judgment it will therefore not be disturbed. The judgment of the district court is right, and is

AFFIRMED.

LETTON and ROSE, JJ., not sitting.

STATE OF NEBRASKA, PLAINTIFF, V. STANDARD OIL COMPANY ET AL., DEFENDANTS.

FILED FEBRUARY 13, 1917. No. 19518.

1. **Constitutional Law: INSPECTION FEES: REASONABLENESS.** The fee of ten cents a barrel, chargeable for the inspection of oils, under section 2555, Rev. St. 1913, although reasonable at the time of its first enactment, is now, and for many years has been, clearly in excess of the amount reasonably necessary to effectuate the lawful purposes of the act.
2. ———: ———: **PRESUMPTION.** Where the inspection fees exacted under the state statute average largely more than enough to pay expenses, the presumption is that the state will reduce them to conform to the constitutional authority to impose fees solely to reimburse for expense of inspection.
3. ———: ———. The amount of the excess over what is reasonably necessary to pay the expenses of oil inspection, giving to the law the character of a revenue measure, rather than merely a police measure, has been a matter of public record for many years, and

State v. Standard Oil Co.

the legislature, although it has amended the law, has failed to reduce the amount charged for inspection. *Held*, that that portion of section 2555, Rev. St. 1913, fixing the fee at ten cents a barrel as an inspection fee, is void as violative of section 1, art. IX of the Constitution, providing for equal taxation.

Action by the State involving the validity of the Oil Inspection Law. *Judgment for defendants, determining the law invalid.*

Willis E. Reed, Attorney General, J. J. Sullivan and Arthur F. Mullen, for plaintiff.

W. D. McHugh and Amos Thomas, contra.

CORNISH, J.

This action involves the validity of the oil inspection law, in so far as it fixes a fee of ten cents a barrel for inspecting oil. In practical operation the receipts for inspection are so far in excess of the cost of inspection as to make the law a revenue measure, rather than one under the police power providing merely for the reasonable expenses of inspection.

The law has been in force since 1895. In April, 1913, the oil department was consolidated with the food, drug and dairy department. The following is a statement of receipts and expenditures:

Total receipts from oil inspection to April,	
1913	\$438,647.51
Total expenses for oil inspection	217,359.26
<hr/>	
Excess of receipts over expenses (50.4 per	
cent.)	\$221,288.25
Total receipts from oil inspection alone since	
the consolidation, April, 1913, to May 1,	
1916	\$271,521.33
Total combined expenses for all purposes for	
same period	134,672.24
Excess of oil inspection receipts over com-	
bined expenses (50.4 per cent.)	\$136,849.09

 State v. Standard Oil Co.

Total receipts from all sources from time of consolidation to May 1, 1916	\$325,918.28
Total combined expenses	134,672.24
Excess of all receipts over all expenses (58.7 per cent.)	\$191,246.04

It is agreed by the parties that the present excess of receipts over expenditures gives the law the character of a revenue measure, and as a present enactment would be unconstitutional. It would be violative of section 1, art. IX of the Constitution, providing for equal taxation. *State v. Bartles Oil Co.*, 132 Minn. 138; *State v. Poynter*, 59 Neb. 417; *State v. Savage*, 65 Neb. 714; *Bartels Northern Oil Co. v. Jackman*, 29 N. Dak. 236; *State v. Cumiskey*, 97 Kan. 343. It would be violative of the United States Constitution as an attempt to regulate or interfere with interstate commerce. *Foote & Co. v. Stanley*, 232 U. S. 494; *Red "C" Oil Mfg. Co. v. Board of Agriculture*, 222 U. S. 380.

It is the contention of the state that the law does not cease to be valid until the legislative department of the state, with knowledge that in its operation the inspection fee is excessive, fails or refuses to modify or repeal the law; that it is a question of good or bad faith of the legislature. While it is admitted by the defendants and cross-petitioners that no complaint was made by them of the operation of the law before this suit was instituted, they contend that the state and its legislative department have at all times had notice and knowledge of the wrongful operation of the law; that bad faith is shown, so far as it is necessary to be shown, when the law itself in operation proves to be bad; that it is a question rather of the power of the state to impose such a tax than of legislative intent. They are not asking the refunding of money unlawfully paid, but are objecting to further payment.

The knowledge or notice that the state has had is evidenced by the following facts: From 1907 to May,

State v. Standard Oil Co.

1913, the excess averaged 63 per cent., reported monthly to the state auditor and to the governor. In 1913 the state oil inspector, in his printed report to the governor, used this language: "We of this department are considerably gratified after paying all the expenses of every kind, we are able to turn over to the state treasury for the years 1911 and 1912 something over \$76,000." In the printed report of January 1, 1915, 2,500 copies of which were circulated over the state, attention is called to the fact that, since the consolidation of the two departments, \$80,000 has been collected over and above the cost of operation of the two departments. The Nebraska Blue Book and Historical Register for 1915, a copy of which was delivered to each member of the legislature, contained a statement, covering the years 1886 to 1912, inclusive, showing: Total receipts for oil inspection \$470,004.75. Total salaries and expenses \$228,240.35. Total amount paid to state treasurer \$214,238.38. The evidence further shows that, although the legislature has a number of times amended the law governing oil inspection since the first enactment, the ten-cent rate, here involved, has remained the same.

We are of the opinion that these facts show that the state had knowledge, if indeed it is not charged with constructive knowledge, of the practical operation of the law; that, while amending the law, it has seen fit to leave the inspection fee as originally established; that there is no room for indulging the presumption that the legislature has any intention of reducing the inspection fee.

As bearing upon its contention as to bad faith, and the necessity of directly challenging the legislature's attention to the situation, plaintiff cites *Red "C" Oil Mfg. Co. v. Board of Agriculture*, *supra*, *Wadhams Oil Co. v. Tracy*, 141 Wis. 150, and *State v. Bartles Oil Co.*, *supra*. In the case first cited the plaintiff attempted to enjoin the enforcement of an act two days after it went into effect. The court, through Chief Justice White, uses language as follows (p. 391): "The mere designation of

State v. Standard Oil Co.

the exaction as a tax is not sufficient to warrant the deduction that the charge authorized for the inspection was not one really for such purpose. We cannot lightly attribute improper motives to the law-making power." The court would not pronounce the law invalid before trial of it. The question of failure to reduce a fee because it had proved excessive, and of the presumptions arising therefrom, was hardly under consideration. The counterpart of the same question, however, is stated in the syllabus as follows: "If the inspection fees exacted under a state statute average largely more than enough to pay expenses, the presumption is that the state will reduce them to conform to the constitutional authority to impose fees solely to reimburse for expense of inspection."

In *Wadhams Oil Co. v. Tracy*, *supra*, the plaintiff sought to enjoin the execution of the law for various reasons. A demurrer to the petition was sustained. While the petition contained a general allegation that the fees were exorbitant, the court did not treat it as a case where, in its operation, the law had proved to be a revenue measure. The court disposes of the question in paragraph 6 of its syllabus as follows: "An allegation in a complaint, challenging the legitimacy of an ostensible police regulation on the ground that the fees provided for are so large as to show, clearly, that the object thereof was revenue, does not tender an issue of fact for confession or denial by the adverse party, when it can be clearly seen from the face of the pleading, in the light of common knowledge and established judicial rules, that the fees are within reason as mere expenses of executing the law."

The case of *State v. Bartles Oil Co.* 132 Minn. 138, attaches more importance to legislative bad faith or intention than others cited. In the body of the opinion, *Foote & Co. v. Stanley*, *supra*, and *Red "C" Oil Mfg. Co. v. Board of Agriculture*, *supra*, are cited as holding: "That the courts do not interfere immediately upon it

State v. Standard Oil Co.

being made to appear that the amount collected is beyond what is needed for inspection expenses, because of the presumption that the legislature will reduce the fees to a proper amount." Both of these are cases where the court was considering merely the language of the statute, and not its workings in actual operation. The Minnesota opinion recites the fact that from 1903 to 1913, inclusive, the expenses fluctuated from 53 to 98 per cent. of the receipts, averaging 82 per cent.; that these expenses covered only the actual expenses of oil inspection, with no allowance for incidental services rendered by the other departments of the state. It recites that its last legislature had reduced the fee from ten to seven cents. While admitting that the record shows that the fees have been higher than necessary to meet the expenses of an economical inspection, the court say that, under the rules fixed for its guidance, it cannot say that the statute is invalid.

It will be noted that in the Minnesota case no question of what notice or knowledge the legislature needed to have was considered. So far as the opinion shows, the legislature at all times knew the operation of the law. The facts in that case, as will be noted, are radically different from those in the case in hand, both as to the excessive fees and as to legislative action. We think that a careful consideration of the opinion in the Minnesota case, not the law of it as expressed in the syllabus, will show that about all the court has stated, touching this question, is as follows: It recognizes the law to be that the fixing of an inspection fee is a matter within the reasonable discretion of the law-making body; that the courts have no right or authority to interfere until the law, either on the face of it or in its operation, shows that there has been an abuse of discretion on the part of the legislature. Ordinarily, the legislature at the time of enacting a law cannot know beforehand exactly what its working results will be. It follows that the courts will not ordinarily interfere immediately with its execu-

State v. Standard Oil Co.

tion because that would be to say that a law which was reasonably within the discretionary power of the legislature was really enacted in bad faith and intended as a revenue measure. This may be the law. The legislature having a discretionary power and having used it fairly, the courts will always wait until the law is proved bad in operation, and even then will wait until that department of the state, charged with the duty of making and amending its laws, has had time and opportunity to act. Suppose this to be the law. It has no application to a case like the one in hand where for many years the receipts for inspection have been so grossly in excess of expenses of inspection as to give the law the character of a revenue measure, to the knowledge of the state, as shown by the public records.

Whether or not knowledge or good or bad faith of the legislature is a material issue in a case of this kind, we do not decide. It is the opinion of the writer that the legislative intent of members of the legislature is quite immaterial. The legislature must be presumed to intend that the statute will operate as experience demonstrates that it does, in fact, operate.

Let us add that, while it is within the power of the state, for economy or other reasons, to consolidate departments, as was done here, the legislature, in fixing its fees for inspection, should so fix them for each department or business that neither can complain that an unfair proportion of the burden of inspection is placed upon it. The guiding rule for the legislature is to so exercise its discretionary power that the fee established in each business or occupation will, as near as may be, yield an amount not more than reasonably sufficient to pay the cost of inspection in such business or occupation.

We are therefore of the opinion that the inspection fee of ten cents was unenforceable as against the defendants at the time they filed their answer and cross-petition objecting thereto.

Elliott v. Aetna Life Ins. Co.

Inasmuch, however, as the law requires that inspection should be had before oil can be sold in the state, and it is equitable that the expenses of inspection should be paid by the defendant oil companies, it is ordered that the inspection fees, heretofore collected and now in the hands of the clerk of this court, be retained until the further order of the court.

JUDGMENT FOR DEFENDANTS.

MATTIE A. ELLIOTT, ADMINISTRATRIX, APPELLANT, v.
ÆTNA LIFE INSURANCE COMPANY, APPELLEE.

FILED FEBRUARY 21, 1917. No. 18822.

Garnishment: LIABILITY OF INDEMNITOR. Where, according to the terms of an indemnity policy, an insurance company has taken sole and exclusive charge of the defense of an action against the insured for damages for the death of the latter's employee and a judgment has been rendered against the insured, the liability of the insurance company is subject to garnishment where the insured is insolvent, notwithstanding a provision that "no action shall lie against the company to recover for any loss or expense under this policy unless it shall be brought by the assured for loss or expense actually sustained and paid in money by him after actual trial of the issue."

APPEAL from the district court for Douglas county:
CHARLES LESLIE, JUDGE. *Reversed.*

W. C. Lambert and S. L. Winters, for appellant.

Gurley & Fitch, *contra.*

MORRISSEY, C. J.

Plaintiff recovered a judgment against the General Construction Company for the death of her son while in its employ, and in garnishment proceedings summoned the Aetna Life Insurance Company, which had insured the General Construction Company against loss resulting

from claims for damages on account of injuries or death suffered by any employee. The garnishee denied liability to the judgment debtor, on the ground that the latter was insolvent and had not paid the judgment, the policy providing: "No action shall lie against the company to recover for any loss or expense under this policy unless it shall be brought by the assured for loss or expense actually sustained and paid in money by him after actual trial of the issue."

The garnishee was discharged. This action was brought to recover from the Aetna Life Insurance Company for an unsatisfactory answer in the garnishment proceedings. From an order sustaining defendant's demurrer and dismissing the action, plaintiff has appealed.

In addition to the provision quoted, the policy also provided: "Upon the occurrence of an accident the assured shall give immediate written notice thereof with the fullest information obtainable to the home office of the company at Hartford, Connecticut, or its duly authorized agent. If a claim is made on account of such accident the assured shall give like notice thereof with full particulars. The assured shall at all times render to the company all co-operation and assistance in his power.

"If thereafter any suit is brought against the assured to enforce a claim for damages on account of an accident covered by this policy, the assured shall immediately forward to the company's home office every summons or other process as soon as the same shall have been served on him, and the company will, at its own cost, defend such suit in the name and on behalf of the assured, unless the company shall elect to settle the same or to pay assured the indemnity as provided for in condition A hereof.

"The assured, whenever requested by the company, shall aid in effecting settlements, securing information and evidence, the attendance of witnesses, and in pros-

ecuting appeals, but the assured shall not voluntarily assume any liability or interfere in any negotiation for settlement, or in any legal proceeding, or incur any expense, or settle any claim, except at his own cost, without the written consent of the company previously given, except that the assured may provide at the company's expense such immediate surgical relief as is imperative at the time of the accident."

The petition alleges that the insured complied with the provisions of the contract and surrendered control of the action, that defendant herein conducted all negotiations for settlement, took sole charge of the action against the General Construction Company, and from a judgment in plaintiff's favor took an appeal to the supreme court, where the judgment was affirmed. *Elliott v. General Construction Co.*, 93 Neb. 453. It may also be inferred from the petition that the insured was insolvent when the action against it was commenced.

The question presented seems to be: Where, according to the terms of an indemnity policy, an insurance company has taken sole charge of the defense of an action against the insured for damages for the death of the latter's employee and a judgment has been rendered against the insured, is the liability of the insurance company subject to garnishment where the insured is insolvent, where the policy provides that "no action shall lie against the company to recover for any loss or expense under this policy unless it shall be brought by the assured for loss or expense actually sustained and paid in money by him after actual trial of the issue?"

Defendant contends that the policy is an indemnity contract, and that under the terms of the provision just quoted it is in no case liable to the insured until the latter has actually paid the judgment. In the interpretation of a contract an admissible and a reasonable construction which will not render it invalid should be adopted. The general purpose of the contract should also be considered. The general object of the indemnity

Elliott v. Aetna Life Ins. Co.

was that losses arising from injuries to employees should not fall upon the employer, but upon the insurer, who by the collection of premiums creates a fund with which to pay such losses. To cheapen the cost of insurance the insurer agreed to defend at its own cost all actions which it should be unable to compromise. The employer surrendered control of the litigation, and the insurer, through its attorneys, resisted the claim of plaintiff, was unsuccessful, and appealed to the supreme court, where the judgment was affirmed. *Elliott v. General Construction Co.*, 93 Neb. 453. For every purpose except that of paying the judgment the insurer has been the real litigant. After it has exhausted all legal measures in attempting to defeat plaintiff's claim, it attempts to deprive her of the fruits of the litigation by relying upon the failure of the insolvent employer, the judgment debtor, to pay the judgment, as required by the following provision of the contract: "No action shall lie against the company to recover for any loss or expense under this policy unless it shall be brought by the assured for loss or expense actually sustained and paid in money by him after actual trial of the issue."

This is a proper provision to protect the insurer from claims of the employer before the latter has paid the judgment, since the purpose of the contract was to reimburse him, and not to provide him with funds which he might or might not use to pay a judgment recovered by an employee. This protection is not denied the insurer when through garnishment proceedings after judgment it is compelled to pay a judgment rendered against an insolvent employer. Its obligation under the contract is discharged as fully as if it had paid the employer after he had paid the judgment. Any other construction can serve no purpose except to defeat the collection of plaintiff's judgment. Where the insurer has been the actual litigant it will not be permitted to defeat the collection of the judgment

by insisting upon such a construction. The conclusion here reached has been justified by the supreme court of Minnesota in the following language:

"Upon the record did it appear that the company, the garnishee, was indebted to the defendant when the disclosure was had? It may be conceded that the company intended so to frame the policy that not every avenue of escape from payment in case of a loss should be closed. The main purpose of its business is to obtain and retain the premiums. The object of the assured is to get protection. The object and purpose of the contracting parties is not to be lost sight of in construing a contract, nor is the rule that in case of ambiguity it must be resolved against the one who prepared the instrument."

"If suit is brought on a claim intended to be covered by this policy, the company, after notice, agreed to defend; but, not only that, it reserved to itself the exclusive right to settle or carry on the litigation, excluding the assured from any interference therewith. On these provisions the company acted, assumed the defense, and has carried on the litigation to the bitter end, even after defendant left this jurisdiction. The assured retained no voice or interest in the litigation. The company substituted its interests and its judgment for that of the assured in the action. By so doing it assumed a relation to this plaintiff, and to every plaintiff where under its policy it steps into a suit, which must be considered in construing the contract. Neither public policy nor legal principles can be invoked against the validity of these provisions, if they mean no more than an undertaking to contest an asserted claim against the assured, for which it is liable when established; but if, under the pretense of an insurance obligation, the company carried on litigation in the name of one who has neither voice nor interest therein, and which does not affect the company itself, because the assured is

Elliott v. Ætna Life Ins. Co.

unable or unwilling to pay if plaintiff is awarded judgment, it would seem the company becomes an officious intermeddler. Public policy does not permit a litigant to so surrender control of his lawsuit to one who has no interest in the cause of action. A contract between client and attorney, although the attorney has a lien for his fees on the cause of action, is void, if the client is excluded from control of the cause of action. The policy here should be so interpreted, if possible, that its provisions do not run contrary to law, and that result is reached by holding that the undertaking to defend means something more than carrying on litigation in court. * * * We therefore hold that, in a policy such as this, where the company has come into the litigation and assumed exclusive control thereof under its contract, it recognizes a liability, if it fails to defend successfully, to pay the assured the amount of the judgment it so permits to be established, not exceeding the sum stipulated in the policy, and also that, as to the plaintiff, it should be considered that such judgment is a debt due the assured from the company, and not dependent on any contingency. Payment of the judgment, so far as the rights of the company are concerned, in such case, is a mere *pro forma* matter, and not a condition precedent to its liability to defendant under plaintiff's garnishee proceeding." *Patterson v. Adan*, 119 Minn. 308.

It must be conceded that the majority of courts passing upon this question have taken a different view. The cases are reviewed in *Fidelity & Casualty Co. v. Martin*, 163 Ky. 12. The conclusion reached in the present case, however, is in harmony with the general purpose of the contract, promotes justice, and deprives the indemnitor of no legitimate protection.

The judgment of the district court is therefore reversed and the case remanded.

REVERSED.

CORNISH, J., dissenting.

The maxim, "no wrong without a remedy," refers to legal wrongs. In a free state, where men buy, sell, contract, and mingle with each other, inequities arise of which the law takes no cognizance. My brothers of the bench feel sure that the plaintiff, if defeated, would suffer wrong. I think they are mistaken, and, whether mistaken or not, I feel sure that the decision does the defendant a legal wrong.

Stripped of legal verbiage, the question is: Will the courts permit a contract wherein the insurer promises to indemnify the employer against loss from accident to employees on condition that he shall be notified, shall consent to any settlement made, be permitted to defend the lawsuit, if any, and also on condition that it shall be so far an indemnity contract that the insurer shall not be liable until the employer has actually paid the loss sustained, as determined in settlement or in court?

If such a contract will be permitted, then the contract under consideration will be permitted. One can safely challenge opposition to find a term or provision lacking for such a contract. Its history is that it was carefully drawn with a view to the "payment-first" provision and agreed to by the parties to it. Now, when parties have freely contracted, the courts must abide by the terms of the contract, or tell why not; otherwise, the court makes the contract for the parties and becomes a legislative body. A mere inequity as between the parties is not sufficient. Some ambiguity or repugnancy must be shown, or that it is unconscionable, against public policy, or otherwise forbidden by law. Hard cases make bad law.

In the body of the opinion the court reaches its conclusion through an interpretation of the contract, and gives as a reason for its interpretation that to require payment by the employer of the judgment, before liability of the insurer arises, would make the contract

one against public policy. In the syllabus, which is supposed to state the law of the case, the rule is not made to depend upon interpretation at all, but applies to any contract containing the provision quoted in it. Suppose the next contract which comes before us should be one containing a provision like the one quoted in the syllabus, with these words in addition: "Let no one, either the courts or anybody else, construe this contract to mean that in a certain event the insurer is liable before payment of the loss by the employer; it means, as of course we always intended it to mean, that in no event, the parties having lived up to their contract, shall the insurer be liable until the employer has suffered the loss; that is, has paid it." Will the court then, contrary to the opinion, refuse to call the contract void as against public policy? Will it, in accordance with the rule stated in the syllabus, hold that the liability still exists, even though the contract is against public policy? Probably not; for if, in any such case, the quoted provision is against public policy, then the whole contract, being inseparable, fails. The courts will not perforce give a contract the construction that its language will not permit, to prevent its being void as against public policy.

In the opinion, interpreting the contract, it is thought its provisions may "mean no more than an undertaking to contest an asserted claim against the assured, for which it (the insurer) is liable when established." The "undertaking to contest" is squarely and fully provided for in a section preceding the quoted provision. The quoted provision is the only one in the contract which undertakes to tell when the liability for payment arises against the insurer. Read it again. It seems to the writer that it can have but one possible meaning; that is, that the employer must pay the loss before he is entitled to be indemnified.

It is argued, not as a matter of estoppel, but of interpretation, that the quoted provision may have in

mind a case where the insurer has refused to defend, in which case he will not be liable until the employer has paid the judgment. This suggestion does violence to the terms of the contract. The undertaking to defend is absolute. It forgets that the policy throughout is one to indemnify against loss, and not against liability. The insurer has no right of election to defend or not. By its plain terms, the insurer must either settle, defend, or pay. Under such an interpretation, the insurer can defend only on penalty of assuming the entire liability of the suit.

Would a provision making liability contingent on payment by the employer, combined with the provision that the insurer shall have control of the defense, make the contract void as against public policy? Not, I think, unless we are to make new law. As said by one of the early judges, "Public policy is an unruly horse and dangerous to ride." "Judges are more to be trusted as interpreters of the law." Public policy extended might lead us anywhere, just as would the practice, in deciding cases, of not applying the general rules of the law, but following our sense of equity in the individual case.

So far is the provision requiring notice to the insurer and a right to defend from being against public policy, that what is most valuable in that provision for him would be his, if the provision were entirely left out of the contract. He is the real party in interest, the one who should defend, the one who may have to pay the judgment. At common law, one who has to pay the judgment is entitled to notice, has a right to be present and even be given a voice in the trial. The court would protect his interest to see that no unjust judgment was obtained. The insurer's case is not that of an intermeddler, or of a lawyer, buying a lawsuit, stirring up a lawsuit, or preventing settlement. Probably, at common law, without any contract for it, the employer could not hold him to a settlement without his consent. Under

Elliott v. Aetna Life Ins. Co.

this contract, the employer is as free to settle as if he had never paid his \$30 premium.

How can it be said that the insurer has no interest in the lawsuit when the employer is insolvent? That is to say that insolvents have no credit. Ordinarily, or at least in half of the cases, the insolvent will find it easy to get the money to pay the judgment. The argument assumes that the insurer will know of the insolvency.

Much time is spent in discussing the propriety and purpose of the quoted provision requiring payment first. I do not care how hard this provision may appear to be in the present case. In my opinion, its meaning being clear and unambiguous, the particular purpose or reason which the parties had for inserting it is not the business of the court. The fact that, as free contracting parties, they placed it there is sufficient. If reasons are necessary, they are at hand. The insurer wished to make a strictly indemnity contract. He did not care to be subrogated to a loss which the employer was released by his insolvency from paying. The insurance world recognizes the fact that the irresponsible man is a greater risk than the responsible one. In cases like the one in hand the danger of collusion between employer and employee at once arises. Again, the insurer, on grounds of business policy, may prefer to make sure that the money goes to the injured employee. Without the provision, it may go elsewhere. The opinion itself says: "This is a proper provision to protect the insurer" against the misapplication of the fund. But such need for this protection could only arise in case of insolvency. So we have the court, at this point, making the provision a proper one for this purpose, but, later on in the opinion, holding that it never has any use or application except when the insurer has not conducted the defense. If the provision is in for one purpose, it is in for all purposes within its expressed meaning. The court cannot say it shall apply for this purpose, and

justify itself in refusing it for other purposes because, in the individual case, it would work a hardship, contrary to its notions of justice. The laws are adapted to those cases which more frequently occur. It seems to me the opinion exhibits a strained construction of the contract, due to the particular circumstances of the case. If these contracts work a hardship on employees, that is a consideration for the legislature, not the courts of justice.

The contract, on simple view, is clear and easily understood. Argument about it and the refinements of logic, to make it mean something else, are only confusing. Twenty-four courts, besides the trial court, have passed upon this contract. All but three of them have construed it to be an indemnity, not a liability contract. For a review of the cases, see the recent case entitled *Fidelity & Casualty Co. v. Martin*, 163 Ky. 12.

The courts must remember that they are neither law-makers nor contract-makers, and that contracts not prohibited by law are the law between the parties to them. As said by Sir Frederick Pollock, in his article on Contracts, 7 Ency. Brit. p. 35, the enforcement of contracts is among "the most important functions of legal justice." Page 38: "The business of the law, therefore, is to give effect so far as possible to the intention of the parties, and all the rules for interpreting contracts go back to this fundamental principle and are controlled by it. * * * A rule which can take effect against the judicially known will of the parties is not a rule of construction or interpretation, but a positive rule of law." If we deviate from this rule of construction, there will arise general confusion and uncertainty as to what the law is, not conducive to the ends of justice.

Spratlen v. Ish.

JOHANNA SPRATLEN, ADMINISTRATRIX, APPELLANT, v.
JAMES C. ISH, ADMINISTRATOR, APPELLEE.

FILED FEBRUARY 21, 1917. No. 19123.

Negligence: INJURY: PROXIMATE CAUSE. The proximate cause of an injury is that cause which, in the natural and continuous sequence, unaccompanied by any efficient intervening cause, produces the injury, and without which the result would not have occurred.

APPEAL from the district court for Douglas county:
CHARLES LESLIE, JUDGE. *Affirmed.*

De Bord, Fradenburg & Van Orsdel and John O. Yeiser, for appellant.

W. W. Slabaugh, contra.

MORRISSEY, C. J.

In December, 1909, Fred Spratlen and his family were tenants of Martha M. Ish. The house was equipped with gas fixtures, and was lighted by gas. One of the pipes which ran through the cellar was so constructed that there was a sag or bend therein, and as the moisture in the gas became cooled during the cold weather it settled in this sag and froze. The ice thus formed stopped the flow of gas. Some member of the Spratlen family notified the gas company, and the company sent a man to remedy the trouble. He opened a number of gas jets (among others the one in the bedroom in which plaintiff's decedent slept), and poured alcohol into the pipes for the purpose of thawing the ice. The jet in decedent's bedroom was left open, but, owing to the ice in the pipe, no gas escaped at the time. Mr. Spratlen came in during the night and retired as usual. Some time afterwards, by the action of the alcohol and the rising temperature, the ice thawed, the gas flowed through the pipe, escaped through this jet which the gas company's agent had left open, and Mr. Spratlen was asphyxiated.

Spratlen v. Ish.

The widow, as administratrix of his estate, filed suit against the gas company and Mrs. Ish, the owner of the house. Subsequently plaintiff made a settlement with the gas company, which paid \$3,000 into court and was discharged of all liability, and the case against Mrs. Ish was dismissed. Plaintiff then filed this suit against Mrs. Ish and her son, James C. Ish. The petition seeks to attach liability to Martha M. Ish on the theory that she, as the owner of the house, maintained this defective and improperly drained pipe in which the liquid froze; that this freezing prevented the flow of the gas; that the gas company's employee undertook to eliminate the trouble; that in doing so he left the gas jet open; that the gas company was negligent in leaving the jet open; and that Mrs. Ish was negligent in maintaining these sags or traps in the gas pipes.

James C. Ish, it was alleged, was not a licensed plumber, but that he had done the plumbing in this instance, and was therefore liable for its defective condition. James C. Ish denied that he had done the plumbing. The cause of action against him seems to have been abandoned on the appeal. At the conclusion of plaintiff's evidence, the trial court, on defendants' motion, directed the jury to return a verdict for both defendants. Motion for new trial was overruled, and the plaintiff appeals.

Plaintiff argues that this accident would not have happened if the defendant had not trapped the water in the pipe; in other words, had the pipes properly drained, the agent of the gas company would not have been called and the jet would not have been left open; that the negligent construction of the pipe and the negligent conduct of the gas company were concurrent, and therefore Mrs. Ish and the gas company are jointly and severally liable. Perhaps this case might be disposed of under the rule in *Davis v. Manning*, 98 Neb. 707, but we think it better to meet the direct question: Was the alleged negligent plumbing the proximate

cause of the injury? If this question is answered in the negative, it is unnecessary to determine the rights of landlord and tenant.

The alleged negligence, it will be noted, consisted in permitting one of the gas pipes to sag so that it did not drain properly, and the liquid therein froze and shut off the flow of gas which was desired for illuminating purposes. Had the gas jet been left closed, this would merely have caused inconvenience in lighting the house, but would have caused no other injury. Asphyxiation does not occur from shutting off the flow of gas, but from permitting it to escape. No stretch of the imagination will permit a holding that asphyxiation of plaintiff's decedent was the natural and probable result of such plumbing. If it was not, plaintiff is not entitled to recover.

"An injury that could not have been foreseen or reasonably anticipated as the probable result of the negligence is not actionable, nor is an injury that is not the natural consequence of the negligence complained of, and would not have resulted from it, but for the interposition of some new, independent cause that could not have been anticipated." *Chicago, St. P., M. & O. R. Co. v. Elliott*, 5 C. C. A. 347, 20 L. R. A. 582.

"The concurring negligence of another cannot transform an act of negligence which is so remote a cause of an injury that it is not actionable into a cause so proximate that an action can be maintained upon it. It cannot create a liability against one who does not legally cause it, or make an injury the natural and probable result of a prior act of negligence which was not, or would not have been, such a result in its absence." *Cole v. German Savings & Loan Society*, 59 C. C. A. 593, 63 L. R. A. 416.

Even assuming that defendant had knowledge of the defective plumbing, that she knew that the liquid in the gas might not drain off properly, that the pipes would freeze and the flow of the gas be intercepted,

Rickey v. Omaha & Lincoln Railway & Light Co.

yet she could not have foreseen that the gas company's agent would open the jet and remove therefrom the porcelain tip, and leave the jet open, that plaintiff's decedent would return home during the night and retire without observing the condition of the gas jet, that while he slept the temperature would rise and thaw the ice, that the flow of gas would be resumed and the fatal consequences follow. The defect in the plumbing is legally too remote to contribute to the death, or to impose liability upon the landlord. It was not the proximate cause of the injury. That the trap or sag in the pipe furnished the causation or condition which rendered the accident possible is not to be disputed, but it cannot be logically and reasonably maintained that the landlord should have foreseen or anticipated the negligent conduct of the gas company's employee.

The judgment is

AFFIRMED.

LETTON, J., not sitting.

CHARLES A. RICHEY, APPELLEE, v. OMAHA & LINCOLN
RAILWAY & LIGHT COMPANY, APPELLANT.

FILED FEBRUARY 21, 1917. No. 19889.

1. **Contracts: CONSTRUCTION.** Technical terms in a contract may be given a nontechnical meaning relied upon by one party, where the other party had reason to suppose the former so understood them. Rev. St. 1913, sec. 7909.
2. **Injunction.** An injunction may be granted to prevent a public service corporation from wrongfully cutting off a supply of electricity which it is under contract to furnish.

APPEAL from the district court for Douglas county:
CHARLES LESLIE, JUDGE. *Affirmed.*

Brome & Brome for appellant.

Vinsonhaler, McGuckin & Caldwell, contra.

ROSE, J.

Plaintiff is a dealer in sand, and by means of pumps procures his supply from the Platte river near Louisville. Defendant operates an electric railway between Omaha and Papillion, and transmits and sells electricity for power and other purposes. Under a contract dated February 6, 1914, the parties agreed that plaintiff should be supplied with electricity for the term of two years, and that he should have the privilege of extending the period to five years—an option which he has exercised. For a time plaintiff operated his pumps with electricity furnished under the contract. Claiming that he refused to pay for power used, defendant severed the wires and removed the appliances employed in delivering currents. Plaintiff resorted to equity. From a decree requiring defendant to restore the abandoned service and enjoining further interference therewith in violation of the contract, this appeal is taken.

The appeal presents these questions: Was plaintiff in default in paying for electricity furnished? Was he entitled to the equitable remedy of injunction? Whether he was in default depends on the contract. The material provisions are:

“The rate to be charged for this current will be 21½ cents per kilowatt-hour for the first 60 hours use per month of the maximum demand; 21¼ cents for the second 60 kilowatt-hours, and 2 cents for all current in excess of 120 hours’ use of maximum demand per month. In addition to the above a fixed charge of \$1.50 per horse-power of maximum demand per month will be charged; said maximum demand to be determined by taking the highest average for 15 consecutive minutes (measured by a maximum-demand meter of standard make) during the month for which bill is rendered; said average to be figured on a kilowatt-hour basis. All current to be measured by standard make electrical meters. You to guarantee us a minimum revenue of \$9 per annum per horse-power connected, based upon

the rated capacity given by the manufacturer of the motor. * * *

"We will guarantee that at the above rate your total net cost of operating your 75 horse-power motor on an 8" sand pump shall not exceed \$1 per hour, and it is agreed that should, at the above rate, the total amount of your bills exceed the above guaranty, then you are to make payment to us 'on the guaranty basis. Should the amount not equal the guaranty basis, you are to remit in accordance with the rates in the foregoing paragraph. You to report the actual number of hours motor is operated each month; we to retain the privilege, however, of installing a registering meter at any time. All installations to be based on the same guaranty, in proportion to the horse-power connected. * * *

"Each of your plants are to be dealt with as a separate proposition, but each to be operated under the foregoing conditions."

The trial court found that plaintiff was required to pay for electric power furnished at a rate not exceeding \$1 an hour for each 75 horse-power motor, "based upon the rated capacity given by the manufacturer of the motor," and that payments for additional power should be made on the same basis. If this construction is correct, plaintiff, as shown by the proofs, paid for all the power used by him before bringing suit. Defendant contends, however, that plaintiff was required to pay for the power actually used at the rate specified in the first paragraph of the contract copied herein; the guaranty, as understood by defendant, being that the cost of operating a pump one hour should not exceed \$1 for each 75 horse-power used, without regard to the manufacturer's rated capacity of the motor. Evidence on defendant's behalf shows that electrical engineers use the term "horse-power connected" as meaning the power actually used, which may be twice the manufacturer's rated power of the motor. Under such a construction of the contract the amount due for

Richey v. Omaha & Lincoln Railway & Light Co.

power used each month would exceed the amount for which plaintiff has paid. In view of the entire record, however, the construction adopted by the trial court seems to be correct. Prior to the execution of the contract, defendant proposed the rate mentioned in the first paragraph quoted herein, but plaintiff said that he knew nothing about electrical terms, and that he had been operating a 60 horse-power oil-engine at a cost of 65 cents an hour. The guaranty clause, the second paragraph copied herein from the contract, was then inserted and the contract executed. Under the circumstances the guaranty clause controls conflicting provisions. The contract was drafted by defendant's agents. They were familiar with their technical terms and they knew that plaintiff was not. They had occasion to learn his understanding of the guaranty clause, when considered with the entire contract and the surrounding circumstances. The sense in which they had reason to suppose he understood the contract must prevail. Rev. St. 1913, sec. 7909. He was not in default in paying for electric power used under this construction of the contract.

Was plaintiff entitled to an injunction? Defendant contends that an action at law for damages would afford plaintiff adequate relief. Defendant is a corporation organized under the laws of Nebraska, relating to the organization of railway companies. Rev. St. 1913, secs. 5927-5935. The articles of incorporation authorize it "to generate, sell and transmit electricity for power, light and heating purposes, and for general use to persons, corporations, or municipalities." It is operating an electric railway from Omaha to Papillion. Under authority of statute it transmits "over its right of way currents of electricity for the purpose of * * * supplying power for the use of such railroad and the use of others." Rev. St. 1913, sec. 5930. In its answer defendant admits that it is "engaged in the transmission and sale of electricity to serve individ-

Rookstool v. Cudahy Packing Co.

uals and corporations." The proofs justify a finding that defendant in transmitting and selling electricity is a public service corporation. In that event, defendant insists that plaintiff has an adequate remedy by mandamus. That is the proper procedure to compel a public service corporation to furnish service to the public. *State v. Nebraska Telephone Co.*, 17 Neb. 126. The writ of injunction is, however, a proper remedy to prevent it from wrongfully discontinuing service which it is under contract to furnish. *Seaton Mountain Electric Light, Heat & Power Co. v. Idaho Springs Investment Co.*, 49 Colo. 122, 33 L. R. A. n. s. 1078; *United States Electric Lighting Co. v. Metropolitan Club*, 6 App. D. C. 536; *Egyptian Packing Co. v. Olney Gas Co.*, 183 Ill. App. 447; *Graves v. Key City Gas Co.*, 83 Ia. 714; *Sickles v. Manhattan Gas-Light Co.*, 64 How. Pr. (N. Y.) 33.

The judgment of the district court is therefore

AFFIRMED.

ORA ROOKSTOOL, APPELLANT, V. CUDAHY PACKING COMPANY ET AL., APPELLEES.

FILED FEBRUARY 21, 1917. No. 18647.

1. **Pleading: CONSTRUCTION.** If a petition of a minor by his next friend to recover damages for personal injury alleges the age of the minor at the time of the injury was 14 years, another allegation in the petition that he was under 15 years at that time must be construed as against the pleader as also alleging that he was 14 years old at the time of the injury.
2. ———: **CAUSE OF ACTION: REVIEW.** If such petition counts only upon a common-law liability of the employer, and the evidence and all proceedings upon the trial are consistent only with that construction of the pleadings, and the case is, upon that theory, submitted to the trial court, this court upon appeal will so consider it, and the statute which prohibits the employment of minors between the ages of 14 and 16 years has no application.

Rookstool v. Cudahy Packing Co.

3. **Master and Servant: INJURY TO SERVANT: ACTION: REVIEW.** In such action, if the petition does not allege any defect in the machinery or appliances by which the plaintiff was injured, and no question was suggested upon the trial, it will not be considered in this court upon appeal.

Opinion on motion for rehearing of case reported, *ante*, p. 118. *Former judgment of reversal vacated, and judgment of district court affirmed.*

SEDGWICK, J.

The trial court instructed the jury to find a verdict for the defendant, and by our former opinion, *ante*, p. 118, the judgment of the trial court was reversed. On motion for rehearing the case has been again submitted upon an additional brief and oral arguments.

The plaintiff, who was a minor, brought the action by his mother as next friend to recover damages caused by an injury in an elevator while the plaintiff was in the employment of the defendant company. The petition alleged, "plaintiff herein is a minor of the age of 18 years," and alleged that the accident occurred on the 22d day of May, 1910, and that "plaintiff was at that time less than 15 years of age." As the action was begun on the 23d day of October, 1913, the allegation that he was then 18 years of age was an allegation that when the accident occurred he was more than 14 years of age, and the direct allegation that when the accident occurred he was less than 15 years of age must also, as against the pleader, be construed to mean that he was past 14 years of age. The petition counts entirely upon a common law liability, and not upon the statute which prohibits the employment of a child under 14 years of age, or the statute which prohibits the employment of one under 16 and over 14 years of age, except on certain conditions. The allegation in the petition in that regard was: "Plaintiff further alleges that at that time, and on the date aforesaid, plaintiff herein was a minor, and was not familiar with nor did he appreciate the dangers incident to the operation of

Rookstool v. Cudahy Packing Co.

said elevator, nor did this minor plaintiff understand or appreciate the specific danger, the danger of looking into the elevator shaft in the manner hereinbefore set forth. And plaintiff further avers and alleges that the defendant company failed and neglected to warn plaintiff of the danger of looking into the shaft of said elevator; nor did the defendant company warn this plaintiff of the danger of being caught by the descending elevator while looking into the shaft thereof." If the employment of a child under 14 years of age is the cause of his injury, his employer would be liable for damages. It is not necessary to determine in this case whether the employer of such a child would be liable for any and all injuries that might occur to him while in such employment, without regard to whether said injuries depended upon his tender years, since this record is conclusive that the plaintiff was more than 14 years of age. The plaintiff was himself asked upon the witness-stand to state his age, and stated that he was 18 years of age. If he was 18 years of age at the time of the trial, he must have been more than 14 years of age at the time of the injury, according to the allegations of the petition. The plaintiff and his mother testified that at the time of the accident the plaintiff was 13 years of age. But this was several years after the injury, and must be considered as an error in computation on their part, rather than a deliberate intention without any explanation to deny the allegations of the petition, which were also under oath. This statute has not been frequently construed by this court. The section that prohibits employment between the ages of 14 and 16 years is followed by several sections from which it might be contended that this provision is rather in the interest of the education of the child than to protect it from unnecessary dangers as the former section does. However that may be, this court has said: "Plaintiff, having induced the court to adopt one theory, ought not to complain because a dif.

Rookstool v. Cudahy Packing Co.

ferent doctrine was not followed." *Hankins v. Reimers*, 86 Neb. 307. In that case the petition alleged that the deceased was under the age of 16 years, but the case was tried and submitted to the jury by the court under instructions upon the theory that the action was for the common-law liability, and, as no objection was made to so submitting it, the plaintiff was not allowed to count upon the fact that the deceased was under 16 years of age. As we have already said, the petition in the case at bar counted strictly upon the common-law liability. There was nothing in the evidence or in the manner of trial that indicated any other theory of liability. It was upon that theory that the defendant asked the court to instruct the jury to find a verdict in defendant's favor. No objection was made to the assumption that it was submitted as upon the common-law liability, and the question of the effect of the statutes now being considered was first presented in this court. The *Reimers* case is therefore in point.

The petition alleges that it was customary when the elevator was lowered to give a signal before passing each floor, and that in this case the operator of the elevator neglected to give such signal. This, however, would not justify placing oneself in the shaft to observe the location of the elevator. The plaintiff testified that there was a place at each floor to ring a bell and call the elevator; that there was a bell on the floor where he was hurt, and that he did not ring the bell, but stood there watching his friend; that a man on one floor who wanted the elevator to come to his floor would "ring the bell—push the button." "Q. If he was on floor one he would give it one bell, or number two, two accordingly? Is that the way it was operated? A. Yes, sir. Q. And the elevator did not move unless that bell was sounded? A. Wasn't supposed to, was the way I understood it." This evidence shows that he fully understood how to use the elevator, and that putting his head into the elevator shaft had nothing

Rookstool v. Cudahy Packing Co.

to do with the use of the elevator, but was a matter of idle curiosity.

It is now contended that it was negligence to leave an opening in the shaft that permitted plaintiff to insert his head. But there is no allegation in the petition that raises that question. Nothing is alleged about this opening in the shaft, and no defect in the construction of the elevator or shaft is counted upon. The alleged negligence of the defendant is not proved. The plaintiff's unnecessary act, prompted by curiosity, was the cause of the accident.

Our former judgment is vacated, and the judgment of the district court is

AFFIRMED.

HAMER, J., dissenting.

This case was tried upon the theory that the boy employed in the packing house was under 15 years of age. The petition alleged that at the time of the injury he was "less than 15 years of age." The boy's mother testified: "As a matter of fact his age was 13, going on 14." The defendant answered: "Defendant is not informed as to the exact age of the plaintiff." There was then a denial of the averments contained in the petition "in that regard." They appear to have gone to trial upon the plaintiff's allegation contained in "in that regard." They appear to have gone to trial upon the plaintiff's allegation contained in the petition that he was less than 15 years of age at the time of the accident. There is no evidence which attempts to dispute or in any way to contradict the mother's testimony that the boy was "13, going on 14." She also testified that the truant officer, McAuley, "knew it positively." Nobody denies that. She also testified that her son "went to school in South Omaha ever since he was five years old." The truant officer undoubtedly knew this. He does not deny it.

Rookstool v. Cudahy Packing Co.

The case is to be considered here upon the same theory that it was tried in the district court. We have no business to hear the case in this court upon a different theory than that upon which it was tried in the court below. While the petition may not be very artistic, it states the facts in a way that they can be understood. The petition alleged that the boy, Ora Rookstool, was employed in the hog-killing department of the packing plant; that he "was a minor, and was not familiar with nor did he appreciate the dangers incident to the operation of said elevator, nor did this minor plaintiff understand or appreciate the specific danger * * * of looking into the shaft of said elevator, nor did the defendant company warn this plaintiff of the danger of being caught by the descending elevator while looking into the shaft thereof."

The plaintiff and defendant went to trial upon the plaintiff's allegation that he was less than 15 years of age at the time the accident happened, and the defendant's denial of that allegation. There was undoubtedly an issue to try. Whether the boy was between 14 and 16 or less than 14 might not be material, but, in any event, there would be a liability under the statute.

Section 3575, Rev. St. 1913, forbids the employment of a child under 14 years of age in certain places specified, among which are a manufacturing establishment or a factory or a workshop. The second clause in the section provides that it shall be unlawful for any person, firm or corporation to employ any child under 14 years of age in any business or service "during the hours when the public schools of the town, township, village or city in which the child resides are in session."

It will be noticed that the foregoing section makes the employment of a child under 14 years of age unlawful. It is clearly unlawful, and if the truant officer connived at such employment knowing that the boy was

under 14 years of age, the thing which he did was unlawful, and, whatever his motive may have been, his conduct was still unlawful, and so was the employment of the boy by the packing house.

The next section is a long and labored effort to provide that, where the child is between 14 and 16, he may be permitted to be employed in certain places specified, including a manufacturing establishment or workshop, provided that the person or corporation employing him procures and keeps on file and accessible to the truant officers of the town or city, and certain other officers, an employment certificate.

Section 3577 provides: "An employment certificate shall be approved only by the superintendent of schools of the school corporation in which the child resides, or by a person authorized by him in writing, or, where there is no superintendent of schools, by a person authorized by the school district officers."

Section 3578 provides that the person authorized to issue an employment certificate shall not issue such certificate until he has examined, approved and filed the school record of such child, showing that the child has completed the work of the eighth grade of the public schools or its equivalent, or is regularly attending night school; also "a passport or duly attested transcript of the certificate of birth or baptism, or other religious or official record showing the date and place of birth of such child." It is also provided that an "attested transcript of the birth certificate filed according to law with a registrar of vital statistics, or other officer charged with the duty of recording births, shall be conclusive evidence of the age of such child." It is also provided that the affidavit of the parent or guardian or custodian shall be required only in case the other documents named cannot be produced. It is also provided that such employment certificate shall not be issued until such child has personally appeared before and has been examined by the officer

Rookstool v. Cudahy Packing Co.

issuing the certificate, and, then, when such officer shall sign and file in his office a statement "that the child can read and legibly write simple sentences in the English language, and that, in his opinion, the child is 14 years of age, or upwards, and has reached the normal developement of a child of its age, and is in sound health and is physically able to perform the work which it intends to do." There is then a provision for examination of physical fitness by a medical officer of the board or department of health, or by a physician provided by the state board of inspection. There is then a provision that, whenever the person authorized to issue the employment certificate is in doubt about the age of the child, he may require the party or parties making the application for the certificate to appear before the judge of the juvenile court or the county judge, where the question of the age of the child shall be determined, and the judgment of the court shall be final and binding upon the person issuing the certificate. This section provides: "Every employment certificate shall be signed in the presence of the officer issuing the same by the child in whose name it is issued."

Section 3579 provides that the certificate shall state the date and place of birth of the child, describe the color of the hair and eyes, the height and weight and any distinguishing facial marks, and also the statement that the papers required by section 3578 have been duly examined, approved, and filed, and that the child named in the certificate has appeared before the officer signing the certificate and has been examined.

The act also provides a form of certificate, a limit of the number of hours of employment; the limit to be not more than eight hours in any one day, and not more than 48 hours in any one week.

Section 3585 provides a penalty of \$50 where any one employs a child under 16 years of age, and in violation of this article, and also provides a like penalty

Rookstool v. Cudahy Packing Co.

where one having a child in his control under such age permits it to be employed in violation of the article. There is also a penalty of not less than \$5 a day nor more than \$20 where the party employing the child continues to employ it after being notified by the truant officer or other proper person. There is also a provision for punishing those who make oath to material false statements, by a fine not to exceed \$50. There is also a provision touching the right of an officer to visit any person, firm or corporation employing such children. Upon refusal to permit the officer to make such visit, there may be a fine of \$50, or imprisonment not exceeding 30 days. The presence of a child under 16 years apparently at work in any of the places enumerated in this article is made evidence of his employment in such place. The deputy commissioner of labor and the truant officers are in duty bound to enforce the provisions of the article, and the county attorney shall file complaints against those supposed to be guilty, when informed that the law has been violated. Truant officers are required to visit the places where child labor is employed.

Section 3586 provides that the governor shall appoint a board of five inspectors, two of whom shall be women, and the chairman shall be the executive head of the board, and shall reside in that county employing the largest number of children under the age of 16. Any member of the board shall have power to demand the examination of any child under 16 years by a regularly licensed physician with a view to ascertaining whether the child is able to perform the labor in which it is employed. "No child under sixteen shall be employed who cannot obtain a certificate of fitness from such physician."

Section 3587 provides: "No child under the age of sixteen years shall be employed in any work which by reason of the nature of the work, or place of performance, is dangerous to life or limb, or in which its health

Rookstool v. Cudahy Packing Co.

may be injured or its morals may be depraved. Any parent, guardian, or other person, who, having under his control any child, causes or permits such child to work or be employed in violation of this section, shall be guilty of a misdemeanor and upon conviction shall be fined not more than fifty dollars, or be imprisoned not exceeding ten days."

In this case the child was alleged to be under 15 years, and the mother swore that it was 13, going on 14. It was employed in a packing house, which must be conceded to be a dangerous place. Under the testimony the truant officer and the packing company were all of them guilty. The employer should be fined \$50, or be imprisoned not exceeding ten days. While engaged in this unlawful performance the boy came near losing his life, his scalp was lifted up, his teeth were knocked out, yet it is the purpose of the majority opinion that there shall be no liability, and that the thing done is made legitimate.

Whether the purpose of the truant officer was to enable the boy to assist his mother in making the living, or whether it was to get an additional hand for the packing house, no one may tell from the record. She says in her testimony that she furnished the school authorities a certificate showing the boy's birthday to have been July 26, 1895. When asked if she had done so, she said: "Yes; because Mr. McAuley wanted him to be a little bit older on account of helping me out." On redirect examination she testified: "Q. But as a matter of fact his age was 13, going on 14 years old? A. Yes, sir; and the truant officer knew it positively. He went to school in South Omaha ever since he was five years old."

The petition charges that the employment of the boy was at a time when he "was a minor, and was not familiar with nor did he appreciate the dangers incident to the operation of said elevator, nor did this minor plaintiff understand or appreciate the specific danger * * *

Rookstool v. Cudahy Packing Co.

of looking into the shaft of said elevator; nor did the defendant company warn this plaintiff of the danger of being caught by the descending elevator while looking into the shaft thereof." It will be noticed that it was the purpose of the pleader to state that the boy did not appreciate the specific danger of looking into the shaft, and that he had not been warned concerning the danger of being caught by the descending elevator. His youth and lack of experience were emphasized. All the facts showing that it was wrong to have the boy employed in such a place are set forth. Of course, everybody knows that a boy at the age of 13, or any where between 13 and 15, might do just such a reckless thing as this boy did, and the purpose of the statute is to keep such boys from doing such acts and from being placed by employers where they are likely to do such acts. The judge of the district court does not appear to have paid very much attention to the child labor law. He seems to have been looking for an opportunity to relieve the defendant from liability. He said: "Now this young man went out of his way to put his head over into that elevator shaft, and I do not see that the defendant was guilty of any negligence, and it seems to me that the plaintiff himself would be guilty of contributory negligence." He then says that he will have to sustain the motion. Of course, the boy went out of his way. All boys do when they are of the age of this boy. The child labor statute was passed because the legislature knew that such boys were likely to get hurt because of their recklessness, and to keep them from being employed in places of this kind. Of course, the learned judge of the district court is a very fair-minded sort of man, but he conceived that the defendant was being tried because of negligence alone, and not because the boy was within the limits of the child labor law. He overlooked the age of the boy, because he spoke of him as "this young man." He could not have been much of a young man at the age of 13.

Rookstool v. Cudahy Packing Co.

Section 7662, Rev. St. 1913, provides: "The rules of pleading formerly existing in civil actions are abolished, and hereafter the forms of pleading in civil actions in courts of record, and the rules by which their sufficiency may be determined, are those prescribed by this Code."

Section 7664, Rev. St. 1913, provides: "The petition must contain: First, the name of the court and county in which the action is brought, and the names of the parties, plaintiff and defendant; second, a statement of the facts constituting the cause of action in ordinary and concise language, and without repetition; third, a demand of the relief to which the party supposes himself entitled."

All the requirements of the above section are complied with in the petition, and the undisputed facts show that the boy is 13 years old. It requires a technical construction of the petition to wipe out the boy's claim.

This court in *Hankins v. Reimers*, 86 Neb. 307, held: "Allegations in a petition that a master unlawfully, wrongfully and negligently directed his infant servant to dig a cave in the side of a hill under circumstances particularly alleged, making it dangerous to life and limb to work in said excavation, in effect charges that the master had knowledge or in reason ought to have known of the danger surrounding such work." The court further held: "If the employment of an infant under the age of 16 years, contrary to the provisions of the statute, is the proximate cause of an injury to the child, his master is liable therefor."

The action was one brought against a master for damages following from the death of his infant servant, alleged to have been caused by the master's negligence. The defendant prevailed, and the plaintiff appealed to this court, and this court reversed the judgment of the court below and remanded the case for further proceedings. In that case there was an allegation in the petition that the deceased at the time of the accident

was under the age of 16, and that the work he was directed to do was dangerous to life and limb. The court gave all of the instructions requested by the plaintiff, and they were prepared on the theory that the case was controlled by the general law of master and servant independently of the servant. If there were facts enough stated in that case, it would seem that facts enough have been stated in the instant case. In the opinion it was said: "It is competent for the legislature in the exercise of the police power to fix an age below which children may not lawfully be employed in dangerous occupations. *Lenahan v. Pittston Coal Mining Co.*, 218 Pa. St. 311; *Stehle v. Jaeger Automatic Machine Co.*, 220 Pa. St. 617." The report fails to show a dissent in that case, and at that time this court consisted of Judges Reese, Barnes, Letton, Root, Rose, Fawcett and Sedgwick. If that was good law then, it ought to be good law now.

In *Moran v. Dickinson*, 204 Mass. 559, it was held that using an elevator in the course of employment is dangerous to life and limb within the statute.

The tendency to disregard the provisions of the law in a child labor case, or in any case of that nature, is very strong. The community may be very impatient of any sort of restrictions or attempted regulation in the management of what it considers is its own affair. That even judges and jurors may have sympathy with this feeling would not be strange, and especially the judges, for they are the last to give up the things that have been. To illustrate: It is not a great while since the judges down in Massachusetts were engaged in an attempt to suppress witchcraft. They authorized the whipping of parents and children with equal impartiality. The congressman from the south is said to be against all child labor laws. That the rosy flush of health will fade from the cheeks of the children of the neighborhood if they are kept indoors is no difference to him. They are not his children. It is not

State, ex rel. Woolridge, v. Morehead.

his affair that play, the natural inheritance of children, has been taken away from them by the big factory on the bank of the creek, and that they no longer frequent the shady woods, the rippling brooks, or rove in the fields and lanes. These children, working in the factory and shut off from the sunlight, are a source of revenue to his big constituent, the owner of the factory.

STATE, EX REL., F. M. WOOLRIDGE ET AL., APPELLEES, V.
JOHN H. MOREHEAD ET AL., APPELLANTS.

FILED FEBRUARY 21, 1917. No. 19764.

1. **Banks and Banking: BANK CHARTER: POWER OF BANKING BOARD.** A statute regulating banks and banking does not justify the refusal by the banking board of a bank charter where the proposed stockholders have paid in the banking capital of the proposed new bank, and possess the qualifications required by the statute, and have in all respects complied with the law. .
2. ———: ———: ———. The state banking board cannot adopt rules concerning the granting of charters to proposed new banks, which are in contravention of the statute, and, if it does, such rules are void.
3. **Statutes: CONSTRUCTION.** The statute conferring authority upon an officer or board under the police power of the state should be strictly construed, and all powers not specifically granted or necessarily implied are reserved.
4. **Banks and Banking: BANKING BOARD: DUTIES.** Where privileges are granted by a board created by statute, such privileges should be open to the enjoyment of all upon the same terms and conditions.

APPEAL from the district court for Lancaster county:
ALBERT J. CORNISH, JUDGE. *Affirmed.*

Willis E. Reed, Attorney General, and Charles S. Roe,
for appellants.

Morning & Ledwith, contra.

HAMER, J.

Appeal from a judgment of the district court for Lancaster county. The relators allege an incorporation for the purpose of conducting the Nebraska State Bank at Sidney, Nebraska. They demanded of the state banking board a charter authorizing said corporation to conduct a commercial banking business at Sidney, Cheyenne county, Nebraska, and tendered the payment of the fee of \$25. They also offered to furnish the necessary proof to satisfy said board that the incorporators were all persons of integrity and financial responsibility. The said banking board heard the application of the relators and then, on the 12th day of June, 1916, refused to grant the charter demanded. The banking board concluded that the conditions and existing business in the city of Sidney, and territory adjacent thereto, would not justify the issuance of such charter and the establishment of said bank at said point, and, for that reason alone, refused to issue said charter. It is alleged that said banking board is without legal authority to limit the number of banks in any given locality, and that, in rejecting the application of relators and in refusing to grant said charter, said board exceeded its legal authority, and assumed to exercise a power which it does not possess under the statute. The prayer is that a writ of mandamus issue commanding the said respondents, and the state banking board, forthwith to convene as such board, and to approve said articles of incorporation, and to grant and issue to said Nebraska State Bank a charter authorizing it to transact a commercial banking business at Sidney, Cheyenne county, Nebraska. An alternative writ was issued, and to this the respondents returned that it was proposed to establish a commercial state bank at the city of Sidney; that the city of Sidney has a population of from between 1,500 and 1,600, and that it is supplied with three substantial banks which provide ample and satisfactory banking facilities for the people of Sidney and

State, ex rel. Woolridge, v. Morehead.

vicinity, and that there is no demand or desire on the part of the people of Sidney for an additional fourth bank; that a fourth bank in the city of Sidney will oversupply said city to the detriment of the banking business there located, and will jeopardize the guaranty fund of the state and the public welfare. The respondents in their answer denied that the banking business legitimately done at the city of Sidney was large enough to accommodate an additional bank without injuring the interests of stockholders or directors in existing banks or in such additional bank. A trial was had in the district court of Lancaster county, and a peremptory writ of mandamus was issued commanding the respondents, as the state banking board of the state of Nebraska, "forthwith to approve the application of the relators, and to grant a charter to them authorizing them to establish the Nebraska State Bank at Sidney, Nebraska, as prayed in the petition." The district court also made a finding for the relators: "That the respondents refused to grant a charter to the relators applying therefor for the reason that in the opinion of the board there were already sufficient banking facilities in the town of Sidney, Nebraska, and that the establishment of another bank in that community was unnecessary and would be detrimental to the public interests, and to the banking interests of the state in particular, and would endanger the bank guaranty fund of the state; that said charter applied for by the relators (to the state banking board) was denied for no other reason." The district court also found: "That under the laws of this state the banking board is without power to deny a charter to persons applying therefor for such reason alone; that the banking business is a lawful business and in no way detrimental to the interests of the state; that under the law as it now exists, when persons apply for a charter giving them the privilege of doing a banking business, and are in every way qualified to do the banking business, and have complied with all conditions

and requirements of the law to enter into the banking business in a particular community, the board is without power to deny them the privilege of entering into the banking business and give such banking business in a community exclusively to others, thereby creating a monopoly of banking business in that community."

The following was received from the banking board: "Your favor of the 24th instant, addressed to Hon. John H. Morehead, has been referred to this department, and in reply will say that the banking board rejected the application for the proposed fourth bank at Sidney after carefully considering the same and being fully satisfied that there was no call or need for additional banking facilities at that place, and that it was for the best interests of the depositors and the people of the community generally to disapprove the application and to withhold the issuance of a charter for the proposed bank; too many banks being a detriment." It appears that the board rejected the application on the ground that there was no demand for an additional bank; that is, that an additional bank at Sidney would not be justified.

Section 295, Rev. St. 1913, is apparently directed at the power attempted to be conferred upon the board: "Whenever, after the examination and approval by the state banking board of the statement provided for in the next preceding section, the corporation shall file with the state banking board the oath of the president, or cashier, that the capital stock has been paid in as provided for, and in compliance with section 13 of this chapter, then the state banking board, if, upon investigation, it shall be satisfied that the parties requesting said charters are parties of integrity and responsibility, shall, upon the payment of certain fees as hereinafter provided, issue to said corporation the certificate provided for in section 14 and a charter to transact the business provided for in its articles of incorporation."

State, ex rel. Woolridge, v. Morehead.

This section would seem to be mandatory. If the corporation files with the state banking board the oath of the president or cashier that the capital stock has been paid in, as provided for, and in compliance with section 13 of the chapter, then the banking board shall investigate, and if the parties are parties of integrity and responsibility, and they pay the fees, then the board shall "issue to said corporation the certificate provided for in section 14 and a charter to transact the business provided for in its articles of incorporation." If the legislature had intended to confer upon the banking board the jurisdiction to determine how many banks there should be in any locality, or whether there should not be any, it would have said so. To say that there is some sort of hidden intent in the language used, which does not appear there, would be, upon our part, an invasion of the power which is conferred upon the legislature.

It is claimed that the questions involved in this case were determined in *State v. Morehead*, 99 Neb. 146. An examination of that case shows that the question before the banking board was whether a charter should issue to a bank wherein "the relators intended to conduct the business of a state savings bank in the same room, or in a room immediately adjacent to the room, occupied by the First National Bank of Clarks, and that the officers and directors of the two banks would be the same persons, or practically so." It was not a very wide question that was before the board. The board declined to issue the charter apparently on the ground that the business of the two banks would, under the circumstances, be interlaced, and the fact that they were conducted in such close proximity, and by the same persons, or substantially so, would necessarily lead to confusion. In the opinion it is said: "The act fixed a maximum rate of interest; two or more banks transacting business in the same city are forbidden to use the same name, or names so nearly alike as to cause confusion in transacting business, and, in case such condition did exist at the

State, ex rel. Woolridge, v. Morehead.

time the act became effective, the board is empowered to require such change or modification as will prevent the confusion."

It is further said: "Again, it may be said that when two banks are conducted in the same room, and managed by the same people, depositors may easily be mistaken as to which bank has their account. They may believe that it is deposited under the provisions of this act, while in reality their account is carried in the other bank. Again, it may complicate examinations. National banks are not subject to examination by the state examiners. State banks are not under the control of the federal government, nor subject to examination by its examiners. Experience has shown that, where the banking business is conducted as proposed by the relators, it is easy to transfer funds from one bank to another. If one of the banks finds itself in straightened circumstances, the temptation is great to draw on the other bank to tide it over an examination. Indeed, it is stipulated in the record that, in the year 1913, where a national bank and a state savings bank were conducted under conditions such as are proposed, the failure of the national bank caused the failure of the state bank with a loss to the guaranty fund in the sum of \$54,000." Further discussing the danger of running two banks in such proximity, and by the same persons, the opinion states: "If the guaranty fund does not directly guarantee the deposits in the national bank, yet the fact that in the same room, or in the room adjacent, the same parties are operating a state bank under the guaranty fund may lead the general public to believe that the money deposited in the national bank is also guaranteed."

In adopting that opinion the only thing this court had before it was whether the proposed new bank should start up when its stockholders were stockholders and officers in the national bank, and where there was danger that the guaranty fund would suffer because of the drafts which indirectly, or even directly, might be made upon

State, ex rel. Woolridge, v. Morehead.

it through the stockholders and officers of the national bank. This court said, in substance, that it was for the board to determine whether it would be unsafe to trust the management of a state bank to the officers and stockholders of the national bank, and in a room so close to the national bank that the officers of one bank might readily be mistaken for the officers of the other bank, or the same men might be officers in both banks. This court sustained the banking board when it determined as a matter of safety that the proposed new bank could not start out when its welfare was likely to be attacked by the stockholders and officers of the old bank. That is not this case. This court did not there decide that a charter for a state bank could not be issued in that town, or that it could not be issued to other and different stockholders, incorporators and officers. The banking board was afraid to take the risk of tempting the stockholders and officers of the state bank when possibly their interests were at stake in the other bank. It also considered that there was danger that depositors would mistake one bank for the other. In substance, it said to the applicants for the charter: "You cannot start out with your proposed new bank when there is a possible millstone hanging about its neck in the shape of the old bank." This was the judgment of business men of experience. They knew the danger of what they were talking about.

It is also said in the opinion: "By the Nebraska banking act, article I, ch. 6, Rev. St. 1913, banking is declared to be a quasi-public business, subject to regulation and control by the state, and it is made unlawful to engage in this business, except by means of a corporation duly organized for that purpose." Also: "The act creates a banking board, giving it general supervision and control of all banks coming within its provisions. It is made the duty of the governor to appoint a secretary for the board, and examiners, who are empowered 'to make a thorough examination into all the banks, papers and

affairs of any corporation transacting a banking business in this state.'"

The examiners are empowered to summon witnesses, and also to administer oaths, and to make detailed reports to the banking board, and if the bank is found to be insolvent or conducting its business in an unsafe or unauthorized manner, or is endangering the interests of the depositors, then the examiner may retain possession of the money and property of every description belonging to the bank until the banking board can act upon his report. There is no doubt that the act provides for shutting up a bank and taking care of the interests of the depositors. But that is a very different matter from determining whether one or more banks shall be allowed in a neighborhood. There is no misunderstanding what the legislature has said about regulating the bank and shutting it up for the protection of the stockholders. But that is a very different thing from determining whether a new bank shall be authorized to commence business.

It is strenuously argued that the guaranty fund is to be protected. That is undoubtedly right, but there is no provision that the banking board shall refuse to issue a charter to the proposed new bank simply because members of the board think that there are enough banks in the town or village. When the legislature concludes, if it does, that it will confer the power to limit the number of banks upon the banking board, it may then have the right to do so, but at present there is no act which seems to confer this power.

In the last sentence contained in section 295, Rev. St. 1913, it is said: "On payment of the required fees and the receipt of the charter the proposed bank may begin to transact a banking business." It would seem that, on compliance with the requirements of section 294 in making the preliminary statement and the examination of such statement by the board, and the filing of the oath of the president or cashier that the stock has been paid in, and it shall be further found that the parties seeking

State, ex rel. Woolridge, v. Morehead.

the charter are parties of integrity and responsibility, then the charter shall be issued. And there is nothing after that except the payment of the fees before the bank may begin business.

We are not called upon to determine whether the legislature has the power to confer upon the banking board the authority to limit the number of banks in any particular locality. It will be time enough to pass upon that question when it is reached.

The powers of the board not granted by the statute are withheld. *Morrill v. Jones*, 106 U. S. 466; *Scribner State Bank v. Ransom*, 35 S. Dak. 244; *State v. Cook*, 174 Mo. 100.

Police regulations with no other guide than the uncontrolled discretion of a board are discriminatory, and when so applied that all persons may not engage in legitimate callings upon equal terms, are void. *Iler v. Ross*, 64 Neb. 710; *Yick Wo v. Hopkins*, 118 U. S. 356. A statute passed in the exercise of the police power of the state should be strictly construed. *People v. Sommer*, 106 N. Y. Supp. 190; *People v. Marx*, 99 N. Y. 377.

The judgment of the district court is

AFFIRMED.

CORNISH, J., not sitting.

ROSE, J., dissenting.

Relators complied with the statutory provisions in regard to the incorporation of banks, and applied to the state banking board for a charter to conduct a commercial bank at Sidney, where there are already three substantial banks with facilities sufficient for the accommodation of the entire community. A charter was refused, and to coerce the board into issuing one the district court for Lancaster county, upon motion of relators, granted a peremptory writ of mandamus. Respondents appealed. In reviewing the judgment of the trial court a majority of my associates hold that the board was without power to deny the application of relators. I

dissent. The board in declining to issue a charter to relators acted under a grant of power from the legislature. The majority opinion to the contrary is a departure from the doctrine of a recent decision by a unanimous court. Rev. St. 1913, secs. 284, 339; *State v. Morehead*, 99 Neb. 146.

The question is: Had the board discretionary power to refuse a charter? The act relating to this subject creates a board with power to regulate banks and banking, makes provision for a guaranty fund for the protection of state bank depositors generally, and, among other things declares: "Said board shall have general supervision and control of banks and banking under the laws of this state and no person or persons shall be permitted to engage in or transact a banking business save corporations having complied with the provisions of this article." Rev. St. 1913, sec. 284.

"The state banking board shall prescribe all such forms as may be useful or necessary in carrying out the provisions of this article, and shall have power to make such rules and regulations, not inconsistent with the provisions of this article, as may be necessary or proper to carry it into effect according to its true intent." Rev. St. 1913, sec. 339.

These statutory provisions grant the power exercised by the board in refusing a charter, since the action taken was not unreasonable nor arbitrary. The board's control extends to both "banks" and "banking." The power to limit the number of competitive banks in a community is included in the power to control banks and banking. In *State v. Morehead*, 99 Neb. 146, it was held that the banking act should be liberally construed, that "the intention of the legislature was to vest the banking board with general control and with authority to do all things reasonably necessary for the protection of depositors throughout the state," and that the banking board had discretion to refuse a charter though the applicants had complied with the provisions of the

State, ex rel. Woolridge, v. Morehead.

statute. The doctrine of that case is in harmony with new conditions and modern thought. A lawyer and statesman recently said:

"There is one special field of law development which has manifestly become inevitable. We are entering upon the creation of a body of administrative law quite different in its machinery, its remedies, and its necessary safeguards from the old methods of regulation by specific statutes enforced by the courts. As any community passes from simple to complex conditions the only way in which government can deal with the increased burdens thrown upon it is by the delegation of power to be exercised in detail by subordinate agents, subject to the control of general directions prescribed by superior authority. The necessities of our situation have already led to an extensive employment of that method. The interstate commerce commission, the state public service commissions, the federal trade commission, the powers of the federal reserve board, the health departments of the states, and many other supervisory offices and agencies are familiar illustrations. Before these agencies the old doctrine prohibiting the delegation of legislative power has virtually retired from the field and given up the fight." 2 American Bar Ass'n Journal, 749.

Under the new banking act each state bank is assessed to create funds to protect the depositors in state banks generally. The guaranty feature of the law introduced a new element into the business of banking. Additional safeguards became imperative. Power to limit the number of banking institutions in a community has been granted to administrative boards in other states. In discussing this subject a writer on economics said:

"The guaranty of deposits is so powerful an inducement to depositors, legislators believe, that for fear of its misuse by the incompetent or unscrupulous the banking departments are empowered not only to regulate and supervise banks, but to say what rates of interest they shall pay, and whether the citizens shall establish more

State, ex rel. Woolridge, v. Morehead.

banks. In some states both these powers are exercised." 28 Quarterly Journal of Economics, 111.

The supreme court of Kansas, in upholding the power to limit the number of banks spoke as follows:

"An unnecessary bank in a community is not a thing of passive uselessness only, and so merely of no benefit. It is an active disturber of the financial peace, to the detriment of the public welfare; and it is not very material whether we say that public harm will be prevented or that public good will be promoted by its suppression." *Schaake v. Dolley*, 85 Kan. 598, 609.

The safety of banking institutions, the prevention of failures, and the protection of depositors are subjects of public interest and may be affected by an excess in the number of banks. The failure of an unnecessary bank may destroy all other banks in the vicinity. The old process of elimination through bank failures often resulted in riot and bloodshed. It produced maniacs and paupers. In addition, its fruits were suspicion, distrust and litigation. In conferring upon the state banking board power to supervise and control banks and banking, the legislature meant that a proper limitation on the number of banks should precede, and thus prevent, disaster. To that end the lawmakers authorized the state banking board to lay its restraining hand on applicants for charters, where a new and unnecessary bank may become a menace to the banking business. All of these subjects are fairly within the legislative grant of "general supervision and control of banks and banking." In refusing to issue a charter the board acted under a rule which was "necessary" or "proper" for the purpose of carrying the act "into effect according to its true intent." Rev. St. 1913, sec. 339.

The general purposes of the act should be considered in determining the meaning of the statutory terms used by the lawmakers, including the enactment that the board "shall" issue a charter, if satisfied upon investigation that the applicants are persons of integrity and responsibility

Marshall & Co. v. Kirschbraun & Sons.

and that they have complied with the statutory requirements in regard to the incorporation of state banks. Rev. St. 1913, sec. 295. When the general powers of the board are considered with the obvious purposes of the act, the word "shall" is consistent with discretionary power of the board to reject a charter. *State v. Taylor*, 208 Mo. 442; *State v. Strait*, 94 Minn. 384; *In re O'Hara*, 82 N. Y. Supp. 293.

Believing that the board acted within its powers, and that there is nothing in the record to show that its decision was unreasonable or arbitrary, I dissent from the affirmance of the judgment allowing the writ, and from the opinion of the majority.

MORRISSEY, C. J., concurs in this dissent.

W. W. MARSHALL & COMPANY, APPELLEE, v. KIRSCH-
BRAUN & SONS, APPELLANT.

JOHN FRITZ, APPELLEE v. KIRSCHBRAUN & SONS, APPEL-
LANT.

A. K. BROWN, APPELLEE, v. KIRSCHBRAUN & SONS,
APPELLANT.

FILED MARCH 3, 1917. NOS. 19295, 19296, 19297.

1. **Principal and Agent: AUTHORITY OF AGENT.** Defendant is a manufacturer of creamery butter at Omaha. F. M. Woods was its agent in charge of its cream station at Niobrara. The agent purchased a quantity of cream, paying therefor \$2.01 a pound, when the market value was only 30 cents. For the cream so purchased he issued defendant's checks to the vendors on blanks furnished by it, which, when presented, defendant refused to pay, on the ground that the agent had exceeded his authority in the premises. The evidence examined and discussed in the opinion, and held that the agent's acts in the premises were in excess of the real and the apparent scope of his authority, and defendant is not liable for any sum in excess of the market price of 30 cents a pound.

Marshall & Co. v. Kirschbraun & Sons.

2. ———: ———: **RATIFICATION.** Where in such case the agent, without authority of his principal, mingled the cream so purchased with other cream that belonged to defendant, and the entire mass was afterwards shipped to such principal, who made a salable commodity out of the shipment, which prevented a total loss of the cream to plaintiffs, *held*, not to be a ratification of the agent's acts.
3. **Bills and Notes: BONA FIDE HOLDERS.** *Held*, that the check that was purchased by Marshall & Company, one of the plaintiffs, was bought under circumstances that were sufficient to place the purchaser upon inquiry as to the changes made upon its face, and that he was not a holder in due course.

APPEAL from the district court for Knox county:
ANSON A. WELCH, JUDGE. *Reversed, with directions.*

Switzler, Goss & Switzler and *E. A. Houston*, for
appellant.

W. A. Meserve and *P. H. Peterson*, *contra.*

DEAN, J.

W. W. Marshall & Company, John Fritz, and A. K. Brown, hereinafter called plaintiffs, began separate suits against the defendant in the district court for Knox county. The actions were all consolidated and tried there as one case, and they will be so treated here. Plaintiffs obtained judgment, and the defendant has appealed.

The defendant company is an Omaha concern engaged in the manufacture of creamery butter, having many cream stations in this and other states. On April 12, 1913, and for a few months prior thereto, F. M. Woods was the agent of defendant in charge of its station at Niobrara. On that date the market price of the cream product called butter fat was 30 cents a pound at Niobrara, and Mr. Woods purchased about 600 pounds, giving checks therefor representing a price paid of \$2.01 a pound. For the product so purchased he issued approximately 50 checks to the several patrons of the cream station on printed forms furnished by defend-

ant to the amount of \$1,204.81. When the checks were presented to defendant, payment was refused on the ground that the agent exceeded his authority in purchasing the cream at a figure so greatly in excess of its market value.

The plaintiffs in their brief argue "There are but three questions involved: First. Did F. M. Woods, in the purchase of said cream and the issuance of said drafts, act within the apparent scope of his authority? Second. If he did not act within the apparent scope of his authority, were his acts afterwards ratified by the defendant? Third. Were the contracts of Woods as to the price agreed to be paid prohibited by the anti-discrimination laws of the state, and, if they were, can the defendant be heard to complain?" We find it necessary to discuss only the first and second of the foregoing assignments.

One of the witnesses called by plaintiffs is Mrs. Cora Woods, the wife of the agent, who died before the trial. S. B. Blair is a traveling agent of defendant who called on Mr. Woods at Niobrara a few days before the cream in question was bought. Plaintiffs contend that Mr. Woods received certain instructions from Mr. Blair on the occasion of his visit from which Mr. Woods derived authority to pay the prices for cream on April 12 that are in dispute. Mrs. Woods, in her examination in chief, testified that she was not present during all of the conversation between her husband and Mr. Blair. She also testified that Mr. Blair in 1909 or 1910 told her husband that the card prices sent to agents by the company "were not intended to govern in case of a fight, * * * but to meet the price and go them one better, 'never to follow, always to lead.'" She testified that Blair told her husband in the winter of 1913 to pay "one cent more than the other companies were paying." Mrs. Woods testimony is not only fragmentary, but some of it is remote as to time, and all of it that is material is contradicted by Mr. Blair.

On April 12 there were four cream stations at Niobrara. A rivalry arose among three of the agents with respect to the purchase price of cream. In the morning the market price was 30 cents a pound, or thereabouts, but at noon the buyers were paying 70 cents. In the afternoon one buyer paid \$1 a pound and shortly thereafter another paid \$2 and before night Mr. Woods and one or more of his rivals were paying \$2.01 a pound. Clearly this was not the market price, but one that was artificially inflated for some purpose not altogether clear. But it is not without significance that before the day closed Woods was the only agent who had on hand any of the cream bought that day at more than \$2 a pound; all of the other agents by some means having contrived to dispose of their respective purchases to the unsuspecting agent of defendant. The record shows that one rival agent bought 80 pounds at \$2.01 a pound, and that immediately he employed three men to take the cream so purchased in three separate lots and sell it to Mr. Woods, who paid \$2.01 a pound. One other agent purchased about 9 pounds at \$2 a pound, but soon after the vendor took the cream back, returning the cream check to the agent. The record fails clearly to disclose the identity of the final purchaser at Niobrara of the 9-pound lot, but from a similarity of names and of the quantity involved in the purchase that appears elsewhere in the record there is much more than an inference that it too found its way to the cream station of defendant and that Woods bought it at \$2.01 a pound.

Plaintiffs show that the agent Woods sent a telegram to his principal that was received at the home office by R. L. Kent, an employee there, about 2 o'clock in the afternoon of the day the cream was bought, and insist that the telegram was sufficient to charge defendant in the premises and to be a ratification of the agent's conduct unless promptly repudiated by the principal. Following is a copy of the telegram: "Niobrara, Neb., April 12, 1913. Kirschbraun & Sons, Omaha, Neb.

Marshall & Co. v. Kirschbraun & Sons.

Fight is on, am paying 34 cents for cream. F. M. Woods."

Mr. Kent, who was called by plaintiffs on this point, testified that the telegram was received at defendant's office between noon and 2 o'clock on Saturday, April 12. The telegram was not answered, but, in view of the record before us, to hold that it was notice to defendant that he was paying such an extortionate price for cream would be an absurdity. Mr. Kent, in direct examination, testified that he never authorized the agent to pay more than the "card price" for cream, and that he first learned that the agent had paid \$2.01 a pound on Sunday evening, the 13th, at about 8 or 9 o'clock. He also testified that he called Mr. Woods up by telephone on Monday, April 14, and in behalf of the company notified him that he was relieved of his agency.

Following is a copy of the postal card notice sent by defendant to Mr. Woods shortly before April 12, authorizing him to pay 30 cents a pound for butter fat:

"Omaha, Neb., April 7, 1913.

"STATION OPERATORS:

"Effective Wednesday morning, April 9th, put your price of butter fat to 30c. This is an extraordinarily high price under the existing market, so do not, under any consideration, exceed this figure, without first taking it up with this office. If you have trouble in buying on this quotation, call us up by 'phone.

"KIRSCHBRAUN & SONS, INC."

Plaintiffs argue that "no presumption of want of authority would arise by reason of the fact that \$2 and \$2.01 a pound was paid and offered for butter fat." With the record before us, it appears that the presumption points in the opposite direction. A purchasing agent, having authority to buy for his principal a common article of commerce that is worth, when bought, approximately 30 cents a pound, without authority pays \$2.01 a pound, an abnormal price that is almost seven times more than its real or market value at the time,

and so known to those dealing with the agent. Can it be that such conduct on the part of an agent is not sufficient to put a reasonably prudent man on inquiry as to the authority of the agent to do a thing so unusual? Apply the rule contended for by plaintiffs to the purchase or sale of wheat or sugar or coal or flour or farm implements or clothing or any of the innumerable necessities of life, and, in the absence of the agent's authority in a like case, the entire lack of fairness, the absurdity of the transaction, is at once apparent. Such conduct on the part of the agent cannot be upheld except upon the clearest proof of authority or proof of ratification by the principal, and both are lacking in the present case.

Plaintiffs argue that, even if the agent was not authorized to purchase the butter fat at the price of \$2.01 a pound, defendant ratified the unauthorized act by accepting the shipment on arrival at Omaha; but they clearly fail to establish their position. Defendant did right in taking the cream and converting it into a salable commodity. Butter fat and kindred dairy products are perishable goods, which, in brief, impose a duty upon the party who is in possession of the goods in a proper case of so disposing of them as to prevent loss. 30 Cyc. 1394, note 69. The agent's purchase of cream at \$2.01 a pound was not only unauthorized, but he without authority mingled the cream so purchased by him with cream belonging to defendant of the value of 30 cents a pound, so that it could not be separated and plaintiffs' cream returned to them in kind, as they insist should have been done. The defendant converted perishable property into a salable article of commerce. Obviously on this point plaintiffs' protest is not well grounded.

The record before us shows that defendant acted fairly from the inception of the trouble. In its answer it offered to pay to plaintiffs 30 cents a pound for the butter fat in dispute, but the offer was not accepted. It is not denied that the company even tried to "buy its peace,"

Marshall & Co. v. Kirschbraun & Sons.

which it had a perfect right to do without compromising or waiving its defense, by offering the plaintiffs 50 cents a pound for the cream in dispute, "rather than have any trouble about it," as the president of the company testified. This too was not accepted.

Another feature remains. Two of the drafts in suit are in excess of the printed limitation of \$15 that appears on the face of each. Following is the form of the draft:

"Kirschbaum & Sons, Inc. Manufacturers of Fancy Creamery Butter, Wholesale Butter & Eggs, Cold Storage and Freezing, 1209-1211 Howard Street. Original. Station —. Date—, 19—. No. 2665. Creamery Department. This check for cream only. Not good for more than \$15. At sight, pay to the order of—,—dollars.

"To Kirschbraun & Sons, Inc., Omaha, Neb., or payable through First National Bank, Omaha, Neb.—,—, Operator."

Marshall & Company, appearing as plaintiffs herein, are merchants, who sue to recover \$37.98 as innocent purchasers of a check for that amount issued to G. Summers for cream on April 12, 1913, at \$2.01 a pound. The check, properly filled in and with the name "F. M. Woods" appended thereto over the word "operator," that was introduced in evidence is the same as the check shown above, except that a line was drawn through the words, "This check for cream only. Not good for more than \$15." The words beneath the line are plainly discernible. The check in question is in such condition as to put the purchaser on inquiry, and he could not be an innocent purchaser. It contained two limitations: First, it was by its printed terms good for only \$15; second, the \$15 limitation was defaced. There is no testimony as to the time when, nor by whom, the Marshall & Company check was changed. But there is testimony showing that a like check was changed in a like manner by Mrs Woods, by direction of her husband, on April 12, in payment for cream at \$2.01 a pound. The president

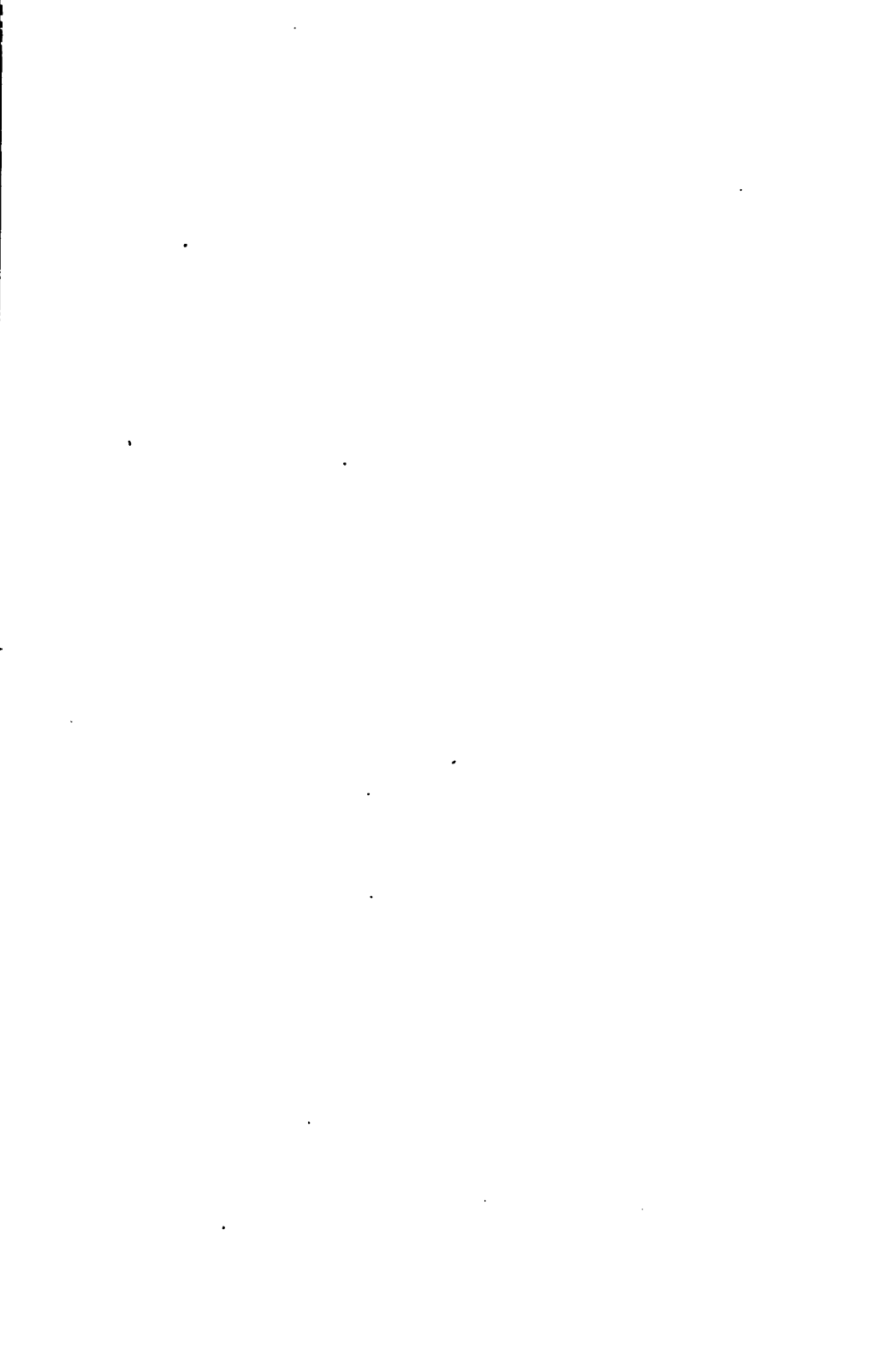
Marshall & Co. v. Kirschbraun & Sons.

of the defendant company testified that no authority was ever given to any agent of defendant to enlarge the \$15 limitation on the check. From all the facts in evidence we conclude that Marshall & Company, even if they did not have actual knowledge, were put upon inquiry as to the validity of the check on which they brought suit, and as to them they are only entitled to recover the same as the other defendants, namely, 30 cents a pound for the cream that was sold to agent Woods by G. Summers, from whom Marshall & Company purchased the check in suit. 1 Parsons, Notes and Bills (2d ed.) p. 119; 1 Randolph, Commercial Paper (2d. ed.) sec. 386.

It is the judgment of this court that plaintiffs, respectively, recover from defendant 30 cents a pound for all cream delivered on April 12, 1913, by A. K. Brown, J. Fritz, and G. Summers, respectively, to F. M. Woods. The judgment of the district court is reversed, with directions to enter judgment in that court in harmony with the views expressed in this opinion.

REVERSED.

HAMER, J., not sitting.



INDEX.

Abatement.

An action in a state court to recover an occupation tax against a corporation should be abated pending an action in the federal court to determine whether an ordinance regulating the rates of service is confiscatory. *City of Lincoln v. Lincoln Gas & Electric Light Co.* 188

Action.

Causes of action may be united under sec. 7658, Rev. St. 1913, only where they affect all parties to the action. *Radcliffe v. Lavery* 31

Adverse Possession.

Title may be acquired by adverse possession, though claim of ownership was invalid and occupant believed he was asserting legal rights only. *Erickson v. Crosby* 372

Aliens.

1. Under a treaty removing the statutory disqualification of a nonresident alien to inherit land in Nebraska and allowing three years within which to sell the same, the disqualifying statute is suspended; but, if the alien fails to sell the land within the prescribed period, it will descend as it would in absence of a treaty. *Pierson v. Lawler* 783
2. Under a treaty suspending the statute disqualifying a nonresident alien from inheriting land in Nebraska and allowing three years within which to sell the same, with reasonable extension of time if circumstances require it, whether circumstances require extension of time is a question for the courts. *Pierson v. Lawler* 783

Animals. See CONSTITUTIONAL LAW, 1, 2.

Appeal and Error. See COSTS, 1. DAMAGES, 5. HABEAS CORPUS, 2. MASTER AND SERVANT, 6. REPLEVIN, 3. WILLS, 13.

Appeal and Error—Continued.

1. When the law of the case is determined on appeal, the trial court is bound thereby, and its judgment accordingly will not ordinarily be disturbed on another appeal. *Home Savings Bank v. Shallenberger*..... 113
2. In an action on a liquor dealer's bond, an instruction that liability of surety is coextensive with that of the principal, held not prejudicial, where judgment against surety was limited to amount stipulated in the bond. *Hawth v. Sambo* 160
3. To warrant reversal of a judgment for error, it must affirmatively appear that the error was prejudicial. *Johnson v. Lane* 177
4. When a bill of exceptions has been quashed, no question can be considered, a determination of which involves an examination of the bill. *Kriebs v. Kriebs* 180
5. Appeal to the supreme court does not deprive the district court of jurisdiction to grant a new trial. *Smith v. Goodman* 284
6. In a law action tried to the court, his findings are entitled to the same weight as a verdict. *State Bank v. Huffman*..... 396
7. The overruling of a motion to bring in as an additional defendant another wrongdoer, alleged to be liable as an indemnitor, is not a final order under sec. 8176, Rev. St. 1913. *Kaplan v. City of Omaha*..... 567
8. That the jury errs in its judgment of the amount of damages is not such conclusive evidence of prejudice as to admit of no other conclusion. *Van Dorn v. Kimball*..... 590
9. Error cannot be predicated on the admission of incompetent evidence in a cause tried to the court. *Crinkley v. Rogers* ... 647
10. In a trial to the court, it will be presumed that the court considered only competent evidence. *Crinkley v. Rogers*..... 647
11. Refusal to strike allegation of meaning of a written contract held not ground for reversal, where the jury correctly determined such meaning. *Felthausen v. Greeble*..... 652
12. Where three persons were sued jointly and there was proof of joint liability for part of the claim, a verdict for such part will not be set aside. *Ryan v. Bullion*..... 705
13. Where the supreme court finds the evidence overwhelming in plaintiff's favor, but reverses and remands the case because of other errors, it is not error on a retrial, the evidence being substantially the same, to direct a verdict for plaintiff. *Roper v. Milbourn*..... 739
14. On appeal from an order sustaining a general demurrer to the petition, the supreme court will consider only the sufficiency of the petition. *Patterson v. Morehead*..... 760

Appeal and Error—Continued.

15. Counsel cannot question on appeal remarks of opposing counsel, where no objection was made at the trial. *Kriss v. Union P. R. Co.*..... 801
16. Where a judgment is clearly excessive, a remittitur will be ordered, and, if not filed, the judgment will be reversed. *Nutter v. Standard Land Co.*..... 548
17. Where the amount of the judgment is more than the evidence warrants, a remittitur will be required. *Adams v. McGrew* 817
18. Where the only question in issue is the value of land, errors of the trial upon other issues become immaterial. *Adams v. McGrew* 817
19. Where the petition in an action for injuries to a minor counts only on the employer's common-law liability and the case is tried on that theory, the supreme court on appeal will so consider it, so that the statute prohibiting employment of minors between 14 and 16 years of age will not apply. *Rookstool v. Cudahy Packing Co.*..... 851
20. Where the petition in an action for injuries does not allege any defect in the machinery or appliances, and where no question thereof was suggested on the trial, it will not be considered on appeal. *Rookstool v. Cudahy Packing Co.*..... 851
21. The finding of a court in a law action based on conflicting evidence is entitled to the same weight as the verdict of a jury. *First Nat. Bank v. Baldwin*..... 25
22. Though, on appeal in equity, the case is tried *de novo*, where witnesses appeared before the district court and their testimony was conflicting, conclusions of the trial court as to credibility of testimony are entitled to consideration. *Enterprise Planing Mill Co. v. Methodist Episcopal Church*..... 29
23. In a trial to a jury on appeal from justice court, it is error to admit in evidence a transcript containing detailed findings of fact and the judgment of the justice. *Müller v. Swift & Co.* 44
24. A verdict will not be set aside where there is a substantial conflict in the evidence. *Roden v. Williams* 46
25. A verdict on conflicting evidence will not be set aside unless manifestly wrong. *Mundy v. Meyer*..... 296
Shapiro v. Omaha & C. B. Street R. Co. 452
Taylor v. Keneston 730
26. Where the evidence is conflicting, judgment supported by competent evidence will not be disturbed, though a different conclusion might have been reached. *Dohner v. Barr*..... 172
Johnson v. Lane 177

Appeal and Error—Concluded.

27. Where both parties have tried the case as if an essential element was proved, judgment will not be reversed for lack of evidence of such fact. *Underwood v. Chicago & N. W. R. Co.* 275
28. Admission of incompetent evidence on a trial to the court is not ground for reversal if there is sufficient competent testimony to sustain the judgment. *In re Estate of Enyart*..... 337
29. The question of competency of an expert witness is within the discretion of the trial court, and a judgment will not be reversed for a technical omission in laying the foundation unless prejudice affirmatively appears. *Daggett v. Drainage District* 379
30. A general objection to a hypothetical question as to value will not be considered unless attention of the trial court was directed to an omission, or the omission was of such importance that it must have been considered. *Daggert v. Drainage District* 379
31. A party cannot complain of a hypothetical question where questions asked his own witnesses were of the same nature and assumed substantially the same facts. *Sandall v. Otto* 263
32. The use of the word "might" in a hypothetical question to a medical expert, while not to be approved of, is not so prejudicial as to require a reversal. *Van Dorn v. Kimball* 590
33. In an action by ~~holder~~ ^{payee} against indorsers of a note, a finding on conflicting evidence in favor of one defendant and against the other will not be disturbed. *State Bank v. Huffman* 396
34. Jury's finding as to damages will not be disturbed unless clearly unsupported by evidence. *Van Dorn v. Kimball* 590
35. A judgment will not be reversed because of extended cross-examination on an immaterial matter, where defendant's rights were not prejudiced. *Koran v. Cudahy Packing Co.* .. 693

Assignments.

- A power of attorney authorizing assignment of wages does not authorize an assignment of wages under a contract thereafter made. *Richards v. Chicago, R. I. & P. R. Co.* 505

Asylums.

- Ch. 55, Laws 1885, providing for construction of an asylum for insane at Norfolk, and ch. 48, Laws 1887, providing for an asylum at Hastings, were both enacted in view of the general act (Gen. St. 1873, ch. 31) governing all hospitals for the insane of the state. *State v. Gage County* 753

Attorney and Client. See LIMITATION OF ACTIONS, 2.

In an action by an attorney for compensation, his right thereto is a question for the jury. *Ryan v. Bullion* 705

Banks and Banking. See CONTRACTS, 2.

1. Where, on a sale of bank stock, the bank's president agreed to pay to the purchaser notes held by the bank, to be selected by the purchaser, the contract may be enforced after the purchaser has made a selection. *Galt v. Hildreth* 15
2. An agreement by the seller of bank stock to pay to the purchaser three-fifths of the difference between the profits of the bank for a designated year and \$8,000 net profit is enforceable. *Galt v. Hildreth* 15
3. In estimating net profits of a bank, the guaranty fund required by law to be set apart may be deducted from the gross profits. *Galt v. Hildreth* 15
4. The state banking board cannot refuse a bank charter where proposed stockholders have fully complied with the law. *State v. Morehead* 864
5. The state banking board cannot adopt rules as to granting of charters to proposed new banks in contravention of statute. *State v. Morehead* 864
6. Privileges to be granted by a state board created by statute should be open to all upon the same terms and conditions. *State v. Morehead* 864

Bastardy.

1. In a bastardy case, it is the duty of the court, when requested, to give a cautionary instruction as to conflicting statements of prosecutrix, in accordance with sec. 361, Rev. St. 1913. *Nelson v. Spratt* 690
2. In a bastardy case, after giving cautionary instruction pursuant to sec. 361, Rev. St. 1913, it is prejudicial error to charge that, if the jury should find that plaintiff had testified falsely in regard to any material fact, they might disregard her testimony, unless corroborated. *Nelson v. Spratt* 690

Beneficial Associations. See INSURANCE, 7-22.**Bills and Notes.** See JUDGMENT, 1.

1. A clause in a note waiving demand, notice, and protest, and defenses based on extension of time of payment, held not to render the note nonnegotiable. *First Nat. Bank v. Baldwin* 25

Bills and Notes—Concluded.

2. A payee who by indorsement guarantees payment of the note and waives demand and notice of protest becomes an indorser, and may be sued with the maker. *First Nat. Bank v. Baldwin* 25
3. Where a banker was directed to pay a note out of a special deposit of the maker, payment will be held to have been made at time of direction. *Belk v. Capital Fire Ins. Co.* 260
4. An accommodation maker is one who executes commercial paper without consideration to enable the payee to obtain credit. *State Bank v. Huffman* 396
5. A controversy between joint indorsers of a note as to whether one is an accommodation indorser is no defense as to the holder of the note. *State Bank v. Huffman* 396
6. Defenses to action on note held to go to the merits and not personal. *Galt v. Hildreth* 422
7. Holder of check bearing the words, "not good for more than \$15," through which line had been drawn, held not an innocent purchaser. *Marshall & Co. v. Kirschbraun & Sons* 876

Bonds. See INTOXICATING LIQUORS, 7, 8.

Brokers.

1. An oral contract between the owner and a broker for sale of lands cannot be enforced. *In re Estate of Brockway* 281
2. In an oral contract by a broker to assist in finding and purchasing personal property, a provision that certain real estate shall be used as part payment will not make the contract one for the sale of land within sec. 2628, Rev. St. 1913. *In re Estate of Brockway* 281
3. In an action for commission on an oral contract for the purchase of personalty, where defendant denies the contract as alleged and alleges that the contract was for the sale of realty, the court should hear the evidence and determine the real nature of the contract. *In re Estate of Brockway* 281
4. Instruction as to liability for commission for sale of land approved. *Mundy v. Meyer* 296
5. Where a real estate broker employed for a commission presents to his principal a proposed purchaser, and the principal enters into a binding contract with him, the broker is entitled to his commission. *Felthausen v. Greeble* 652
6. Where the signature of a broker to a contract was written under the name of a witness thereto, held that such signing would not prevent recovery on the contract. *Felthausen v. Greeble* 652

Burglary.

Evidence *held* to sustain verdict of burglary. *Coons v. State* .. 414

Carriers. See EVIDENCE, 4.

1. To entitle a shipper to recover for delay in transporting live stock, he must show the time ordinarily required to transport the shipment, and that longer time was consumed than was necessary. *Cohn v. Chicago & N. W. R. Co.* 7
2. It is error to refuse to withdraw from the jury a charge of negligent delay in transportation of live stock, where no competent evidence is introduced to support it. *Cohn v. Chicago & N. W. R. Co.* 7
3. Evidence, in action for delay in shipment of live stock, *held* insufficient to sustain verdict for plaintiff. *Cohn v. Chicago & N. W. R. Co.* 7
4. A contract exempting a carrier from liability, valid where made but contrary to the public policy of Nebraska, will not be enforced in the courts of Nebraska. *Maucher v. Chicago, R. I. & P. R. Co.*..... 237
5. A contract to relieve a carrier from liability for negligence resulting in injuries to passengers *held* not governed by federal statute, but by state law, and void. *Maucher v. Chicago, R. I. & P. R. Co.* 237
6. A contract limiting liability of a carrier to circus employees traveling in cars of the circus company *held* not to relieve the carrier from liability for injuries in a rear-end collision. *Maucher v. Chicago, R. I. & P. R. Co.*..... 237
7. Where, on application to restrain a railroad company from violating a maximum rate statute, it is shown that the company has obeyed it for a long term of years, and there is no proof that it intends to violate it, the application will be denied. *State v. Chicago, R. I. & P. R. Co.* 268
8. Secs. 5988-5990, Rev. St. 1913, requiring common carriers to furnish adequate telephone connections between their offices and the local telephone exchange, is not unconstitutional. *State v. Missouri P. R. Co.* 700

Compromise and Settlement.

Settlement of a controverted matter between officers and directors of a bank and debtors *held* binding on all parties. *Galt v. Hildreth* 15

Constitutional Law. See CARRIERS, 8. CORONERS. MUNICIPAL CORPORATIONS, 9. STATUTES.

1. Secs. 2 and 9, ch. 170, Laws 1915, restricting sale of anti-hog cholera serum, *held* unconstitutional. *Hall v. State* 84

Constitutional Law—Concluded.

2. Sec. 2, ch. 170, Laws 1915, restricting sale of anti-hog cholera serum, *held* unconstitutional, as granting a monopoly to serum-manufacturing plant licensed under the federal act, 37 U. S. St. at Large, ch. 145. *Hall v. State* 84
3. Ch. 224, Laws 1915, requiring the county attorney to perform the duties of coroner, is not unconstitutional as clothing an administrative or executive officer with judicial power. *State v. Moorhead* 298
4. The Supreme Court Commission Act (Laws 1915, ch. 184) *held* constitutional. *In re Supreme Court Commissioners* ... 426
5. That portion of the Supreme Court Commission Act (Laws 1915, ch. 184) requiring the appointment of commissioners recommended by the governor is void. *In re Supreme Court Commissioners* 426
6. An ordinance requiring companies maintaining poles and wires in streets to remove same to allow passage of buildings is not unconstitutional as depriving the companies of property without due process of law. *State v. Omaha & C. B. Street R. Co.* 716
7. Sec. 2555, Rev. St. 1913, fixing fee of ten cents a barrel for inspection of oils *held* violative of sec. 1, art. IX, Const., providing for equality of taxation. *State v. Standard Oil Co.* ... 826
8. Where inspection fees exacted are largely in excess of expenses, the presumption is that the state will reduce them to conform to constitutional authority to impose fees solely for reimbursement of expenses. *State v. Standard Oil Co.* 826

Contracts. See BANKS AND BANKING, 1, 2. CARRIERS, 4-6. EVIDENCE, 1, 6. HUSBAND AND WIFE.

1. On refusal to perform a contract for exchange of properties, the injured party may treat the contract as terminated and sue for the value of property he has delivered. *Smith v. Lohr* 4
2. An agreement between two banks that notes should be transferred by one to the other to make it falsely appear that the transferor has not violated the law by making excessive loans is illegal and unenforceable. *Exchange Bank v. Clay Center State Bank* 278
3. Where a grantee assumes a mortgage and allows foreclosure, he cannot rescind on the ground that he was deceived as to the land and that the grantor held no title; the title not being questioned except by enforcement of the mortgage. *Crowell v. Skillcorn* 429

Contracts—Concluded.

4. Technical terms in a contract may be given a nontechnical meaning relied upon by one party, where the other party had reason to suppose the former so understood them. *Richey v. Omaha & Lincoln Railway & Light Co.*..... 847

Coroners. See CONSTITUTIONAL LAW, 3. STATUTES, 4, 5.

- The powers and duties of coroner are not judicial, within the meaning of art. II, Const., dividing governmental powers.
State v. Moorhead 298

Corporations.

1. In determining whether rates of a public service corporation are remunerative, the validity of an occupation tax must be considered. *City of Lincoln v. Lincoln Gas & Electric Light Co.* 188
2. In a suit alleging misrepresentations as to value of bonds of a corporation by its stockholders, directors and officers, where there was no evidence that the president made any representations or that he was derelict, he will not be held liable. *Horn v. Abbott* 403

Costs.

1. Under sec. 6063, Rev. St. 1913, making a common carrier liable for an attorney's fee where a shipper recovers damages for loss of freight, the shipper cannot recover such fee for services on appeal. *Northcutt v. Missouri P. R. Co.* 1
2. Sec. 8168, Rev. St. 1913, relating to costs in district court in cases cognizable before a justice, does not apply to costs in the supreme court. *Underwood v. Chicago & N. W. R. Co.* ... 507
3. Under sec. 8168, Rev. St. 1913, plaintiff cannot recover costs in an action begun in the district court which is cognizable before a justice of the peace. *Underwood v. Chicago & N. W. R. Co.* 507
4. The supreme court will not retax costs on appeal, though a remittitur is required reducing the judgment within the jurisdiction of a justice of the peace. *Underwood v. Chicago & N. W. R. Co.* 507
5. Where appellant recovers a better judgment than the one appealed from, he is ordinarily entitled to costs of appeal. *Underwood v. Chicago & N. W. R. Co.* 507

Counties and County Officers. See TAXATION, 9.

1. To justify removal of a county officer under sec. 5698, Rev. St. 1913, it must be clearly shown that his action was prompted by evil intent or legal malice, or at least without sufficient grounds to believe that he was properly performing his duty. *Hiatt v. Tomlinson* 51

Counties and County Officers—*Concluded.*

2. Sec. 35, ch. 19, Laws 1866 (Rev. St. 1913, sec. 2461), is superseded by sec. 37, p. 366, Laws 1879 (Rev. St. 1913, sec. 965). prescribing the verification required to be attached to claims filed against a county. *Uttley v. Sievers* 59
3. In constructing a bridge as part of a county road, the county must provide not only for ordinary vehicles, but for what may be fairly anticipated in the locality, including the driving of cattle over the bridge and its approaches. *Miles v. Richardson County* 294
4. Where a visible defect in the approach to a bridge had existed for such length of time as to charge the county with notice, the county is liable for injury caused thereby. *Miles v. Richardson County* 294
5. Where governmental authorities have recognized for many years a boundary line between counties established by a void legislative act, courts will not change the boundary line. *State v. Clary* 324
6. It is not the duty of a county attorney to prosecute one charged with violation of a village ordinance, where prosecution is not based on violation of any state law. *State v. McDonald* 332
7. County held liable to one injured on a defective bridge while riding in a private vehicle, notwithstanding negligence of the driver. *Reudelhuber v. Douglas County* 687
8. In an action against a county for injuries resulting from a defective bridge, evidence held to sustain verdict for plaintiff. *Reudelhuber v. Douglas County* 687
9. Sec. 2443, Rev. St. 1913, requiring the county commissioners to determine the number of deputies of the sheriff and to fix their compensation, held not to repeal by implication sec. 5735, Rev. St. 1913, empowering the sheriff to appoint deputies. *State v. Harris* 745

Courts. See EXECUTORS AND ADMINISTRATORS, 1.

- A state court will deny an application for injunction, where the federal court has taken jurisdiction of the subject-matter. *State v. Chicago, R. I. & P. R. Co.* 268

Criminal Law. See BURGLARY. INFORMATION. INTOXICATING LIQUORS, 1-3. LARCENY.

1. In a prosecution for selling liquor to a minor, it is no defense that accused acted in ignorance of the minor's age and without intent to violate the law. *Steinkuhler v. State* 95
2. Sec. 1162, Rev. St. 1913, requires criminal trials to be held in the court-room. *Roberts v. State* 199

Criminal Law—Concluded.

3. Requirement that trials be public is satisfied by admitting those who can conveniently be accommodated in the court-room. *Roberts v. State* 199
4. It is not proper to adjourn the trial of a capital offense from the regular court-room to the stage of a public theater without sufficient cause. *Roberts v. State* 199
5. Where the witnesses for the state are near relatives, or are so associated that it is not improbable that some may be under the influence of others, it is error to refuse request that they be separated. *Roberts v. State* 199
6. While it is improper to allow a witness to the principal facts to conduct the trial, judgment will not necessarily be reversed because an attorney who was also a witness assisted the prosecuting attorney in the preparation and details of the trial. *Roberts v. State* 199
7. Where, in a trial for felony, the bailiff, without an order of court, took a quantity of miscellaneous articles, including exhibits, to the jury-room, where they were examined by the jury, it is ground for a new trial. *Roberts v. State* 199
8. Where evidence of crime is direct and corroborated, accused is not entitled to an instruction that, if the evidence is reconcilable with innocence upon any reasonable hypothesis, accused is entitled to acquittal. *Casper v. State* 367
9. Where the right of a deputy county attorney to sign an information is not questioned until after arraignment and plea, and while a plea of not guilty is pending, his appointment and right to sign will be presumed, in absence of a showing. *Holland v. State* 444
10. It is not error for the court, at request of county attorney, to appoint special counsel to assist in the prosecution of a misdemeanor. *Goemann v. State* 772
11. Instruction as to reasonable doubt held free from error. *Goemann v. State* 772
12. Ruling on the scope of cross-examination will be upheld, unless abuse of discretion is shown. *Goemann v. State* 772

Damages.

1. Verdict for \$16,000 in favor of widow under the federal employers' liability act for death of a conductor who was earning \$113 a month and had an expectancy of 34 years, plaintiff being younger, held not excessive. *Phillips v. Union P. R. Co.* 157
2. Award of \$10,000 for personal injuries held not excessive. *Maucher v. Chicago, R. I. & P. R. Co.* 237

Damages—Concluded.

3. Award of \$15,000 for personal injuries held not excessive. *Croghan v. Chicago, R. I. & P. R. Co.* 253
4. Verdict for \$5,275 for injuries to laborer held not excessive. *Sadt v. Sunderland Bros. Co.* 350
5. Where a verdict includes an item of damage not proved, a remittitur will be required. *Kriss v. Union P. R. Co.* 801

Divorce.

Where a decree in a divorce assigns custody of children, such disposition will control until the decree is modified, and cannot be disregarded in habeas corpus for possession of the children. *State v. Elifritz* 320

Domicile.

Where the owner of a home in one county sells it with the intention of removing to another county, his final removal will relate back to the time of the sale. *In re Estate of Getchell* 579

Drains. See QUO WARRANTO, STATUTES, 10, 11.

1. Interest received by a county treasurer on drainage district funds is money of such district and should not be credited to the county general fund. *Nemaha Valley Drainage District v. Nemaha County* 64
2. Under sec. 1858, Rev. St. 1913, requiring a drainage district to pay fees of county officers rendering it services, the county is entitled to retain fees fixed by statute for taxes and special assessments collected by the county treasurer. *Nemaha Valley Drainage District v. Nemaha County* 64
3. Owners of lands outside proposed drainage district cannot intervene and object to the organization of the district on the ground that the improvement will injure their lands. *Latham v. Chicago, B. & Q. R. Co.* 173
4. Sec. 1872, Rev. St. 1913, permitting corporations owning or having an easement in land to vote at elections for drainage improvements, does not allow double representation of land, but the easement must be of a substantial nature, analogous to ownership. *State v. Drainage District* 625
5. Where persons who assume to vote for a railroad company or for a county or township in an election for drainage improvements are not formally authorized, their acts may be ratified. *State v. Drainage District* 625
6. Under sec. 1872, Rev. St. 1913, landowners cannot represent in an election for drainage improvements land lying in a public highway. *State v. Drainage District* 625

Drains—Concluded.

7. If an election under sec. 1914, Rev. St. 1913, results in the rejection of the proposition to proceed with work, the directors of the drainage district have no power to proceed. *State v. Drainage District* 625

Easements.

- Exclusive possession and a record right of possession to use land indefinitely is an easement equivalent to ownership. *State v. Drainage District* 625

Election of Remedies.

- One who with knowledge of the facts has chosen an appropriate legal remedy and obtained full satisfaction cannot ordinarily afterwards resort to a remedy inconsistent therewith. *Brady v. State Ins. Co.* 497

Eminent Domain.

1. The right of eminent domain cannot be exercised for a purely private purpose. *Vetter v. Broadhurst* 356
2. Land of one proprietor cannot be condemned for a reservoir site solely to irrigate land of another. *Vetter v. Broadhurst* 356
3. Trial in condemnation may be had in name of person as plaintiff who owned the land when proceedings were commenced, but the court should order payment of award to party entitled to damages. *Sternberger v. Sanitary District* 449
4. Award for taking of land for ditch held excessive. *Sternberger v. Sanitary District* 449

Equity.

1. In a suit to recover remainder of price of land, the rule that he who seeks equity must do equity applies, and the purchaser may show any equity authorizing reduction of amount of recovery. *Fassler v. Streit* 722
2. Where a conveyance was made without consideration to defeat a judgment in an anticipated suit, equity will not aid the grantor to set aside the conveyance. *Palmer v. Palmer* 741

Evidence. See APPEAL AND ERROR, 21-35. HUSBAND AND WIFE, 1, 3. LIENS. NEGLIGENCE, 2-4. NEW TRIAL. TRUSTS, 1. WITNESSES.

1. In absence of fraud, mistake or ambiguity, parol evidence is inadmissible to vary terms of a written contract. *Roden v. Williams* 46
2. Where settlement with one joint wrongdoer is in writing, oral evidence is competent to show the intent of the parties in an action against one not a party to the settlement. *Hauth v. Sambo* 160

Evidence—Conclude.

3. In a hypothetical question a party may assume facts in accordance with his theory, if there is evidence to sustain it, though there may be a conflict of evidence. *Sandall v. Otto*. 263
4. To recover for shrinkage in weight of cattle caused by delay in transportation, the shrinkage must be proved by competent evidence, and cannot be established by opinion evidence. *Underwood v. Chicago & N. W. R. Co.* 275
5. Where notes were transferred by one bank to another to make it appear that the transferor had not made excessive loans, the illegality of the contract may be proved by correspondence between the banks, and oral evidence is admissible to prove that the transfer was pursuant to such contract. *Exchange Bank v. Clay Center State Bank* 278
6. Where a contract is ambiguous, evidence of the construction placed on it by the parties is admissible. *In re Estate of Enyart* 337
7. In an action on an insurance certificate, where the defense was that insured was killed while committing an assault, evidence of the slayer cannot be disregarded, when corroborated. *Bosler v. Modern Woodmen of America*..... 570
8. Where the evidence is conflicting as to a material matter, a hypothetical question may assume the existence of such matter, it being for the jury to determine whether the hypothesis is warranted. *Van Dorn v. Kimball* 590
9. Where there was direct testimony of injury to the abdomen, expert testimony that hernia might have resulted *held* admissible. *Koran v. Cudahy Packing Co.* 693

Executors and Administrators.

1. The district court has jurisdiction over executors and others holding a fiduciary relation, and may compel proper application of trust funds. *Wunder v. Crane* 446
2. Amount found due from executors *held* sustained by the evidence. *Wunder v. Crane* 446
3. Where a husband was delayed in removing from one county to another by the sickness and death of his wife, *held* that her estate might be administered in the county to which he removed. *In re Estate of Getchell* 579
4. Petition in district court *held* to state the same cause of action as that stated in the claim filed in the county court. *In re Estate of Cormick* 669
5. Where a homestead is sold at administrator's sale to pay debts, and the heirs, with knowledge of the sale to an innocent purchaser, acquiesce therein for more than five years

Executors and Administrators—Concluded.

after becoming of age, knowing that the purchaser is making permanent improvements, they are barred from recovering the property. *Foltz v. Maxwell* 713

False Imprisonment.

1. In an action for damages for false imprisonment, whether the arrest and mental strain and worry could under ordinary circumstances occasion the troubles complained of is material. *Van Dorn v. Kimball* 590
2. In an action for false imprisonment of one wrongfully accused of felony, whether defendant had sufficient ground to believe plaintiff guilty was an important question to be submitted to the jury. *Van Dorn v. Kimball* 590
3. In an action for false imprisonment, whether the arrest was made wholly upon the officer's responsibility or was caused by defendant is a question for the jury. *Van Dorn v. Kimball*.. 590

Fraud.

Although defendant had no actual notice of the fraud of a third party who procured an exchange of valuable land for defendant's worthless stock, the law may impute such notice to him if he received title to the land and disposed of it for his own profit, and hold him liable to plaintiff for the value of the land. *Adams v. McGrew* 817

Garnishment.

1. Where, on attempted garnishment, money is voluntarily paid into court by defendant's debtor, an order directing that it be applied on plaintiff's judgment will not be set aside on appeal solely because of insufficiency of the garnishment proceeding. *Ryan v. Bullion* 705
2. Insurance company held liable as garnishee for money due on a judgment against the insured, notwithstanding a provision of the policy that no action would lie unless brought by the insured for loss or expense actually paid. *Elliott v. Etna Life Ins. Co.* 833

Habeas Corpus.

1. In habeas corpus proceedings for custody of children, where it is shown that the children were not detained by respondent, but were in the custody of the juvenile court, no judgment should be rendered against respondent. *State v. Elsfritz*.... 320
2. A judgment in habeas corpus can be reviewed only by appeal. *In re Application of Selicow* 615
3. The writ of habeas corpus is not allowed to correct errors of inferior tribunals. *In re Application of Selicow* 615

Habeas Corpus—Concluded.

4. Where an inferior court has jurisdiction of proceedings upon complaint of violation of a statute or ordinance, and has not determined the case, defendant is not entitled to release on habeas corpus on the ground of invalidity of such statute or ordinance, unless such invalidity appears on the face of the proceedings. *In re Application of Selicow* 615

Highways.

- Sec. 21, Act of Congress of March 2, 1889 (25 U. S. St. at Large, ch. 405) which "reserved public highways four rods wide around every section of land allotted, or opened to settlement," in the Sioux Indian reservation, amounted to a grant or a dedication for highway purposes. *State v. Raymond Township* 788

Homestead. See EXECUTORS AND ADMINISTRATORS, 5.

- Where a husband and wife reside in a building on two town lots and have no other home, such building will constitute their homestead, though they conduct a hotel therein, and no formal declaration that it is their homestead is necessary. *Foltz v. Maxwell* 713

Husband and Wife.

1. The burden is on the husband or his representatives to show that an antenuptial contract, apparently unjust to the wife, was fairly procured. *In re Estate of Enyart* 337
2. In making an antenuptial contract, the prospective husband must make full disclosure as to the amount and value of his property. *In re Estate of Enyart* 337
3. Where the provision for the intended wife by antenuptial contract is grossly disproportionate to the interest she would acquire by law, the burden is on those claiming the validity of the contract to show full disclosure to her, before she signed it, of the extent and value of the property. *In re Estate of Enyart* 337
4. That an intended wife knows in a general way that her prospective husband is reputed to be wealthy does not satisfy the equitable rule requiring full disclosure in making an antenuptial contract. *In re Estate of Enyart* 337
5. Courts will rigidly scrutinize an antenuptial contract, apparently unjust, where it deprives the wife of her interest in the husband's estate without providing for her in case she survives him. *In re Estate of Enyart* 337
6. Antenuptial contract held invalid. *In re Estate of Enyart* .. 337

Husband and Wife—Concluded.

7. An express contract between husband and wife that she shall receive reasonable compensation for extra and unusual services rendered outside her domestic duties is valid. *In re Estate of Cormick* 669

Indemnity.

- Indemnitor of surety on bond of a saloon-keeper held liable for counsel fees and expenses in defending an action on the bond, where the surety had reasonable cause to believe such expenditure was necessary, though the principal on the bond had employed competent counsel. *Bankers Surety Co. v. Cross* 98

Information.

1. Objection to verification of an information will not be considered after arraignment and plea unless the plea is withdrawn. *Holland v. State* 444
2. Under sec. 5599, Rev. St. 1913, a county attorney may appoint deputies, and a deputy so appointed may sign a criminal information. *Holland v. State* 444

Injunction. See CARRIERS, 7. COURTS. TAXATION, 3, 4.

1. Publication of political matter cannot be enjoined merely because it is false or misleading. *Howell v. Bee Publishing Co.* 39
2. A valid agreement in restraint of trade must be clearly established to warrant restraining its breach by injunction. *Piamondon v. Lindsey* 318
3. One who had no license to practice dentistry, nor any permit under sec. 2806, Rev. St. 1913, cannot enjoin the state board from interfering with him in so practicing. *Patterson v. Morehead* 760
4. An injunction may be granted to prevent a public service corporation from wrongfully cutting off a supply of electricity which it is under contract to furnish. *Richey v. Omaha & Lincoln Railway & Light Co.* 847

Innkeepers.

1. Where the owner of a hotel building does not provide fire-escapes and other safety devices, he is liable for damages for the death of a guest brought about by his negligence. *Hoopes v. Creighton* 510
2. A guest in a hotel does not assume the risk of injury from want of fire-escapes from the building, though he knew of the dangerous condition of the building. *Hoopes v. Creighton* .. 510

Insane Persons. See ASYLUMS. INTEREST. STATES.

The general act (Gen. St. 1873, ch. 31) requiring counties to pay for care of insane persons *held* to govern the three state insane institutions. *State v. Gage County* 753

Insurance.

1. Where a building was destroyed by fire and wind, insurer *held* liable under a fire policy containing a clause exempting it from loss by wind. *Wittig v. Girard Fire & Marine Ins. Co.* 271
2. In an action to recover burglary insurance, evidence *held* insufficient to show liability of insurer under the contract. *Grayson v. Maryland Casualty Co.* 354
3. An insurance policy is a contract, and neither party can make a new contract for the other without his knowledge or consent. *Stephenson v. Germania Fire Ins. Co.* 456
4. The owner of a fire policy who had parted with title to premises cannot assign the policy after a fire, without the knowledge and consent of the insurer, so as to make the insurer liable to a third person for the loss. *Stephenson v. Germania Fire Ins. Co.* 456
5. Sec. 3187, Rev. St. 1913, relating to liability in case of breach of warranty or condition, *held* not to apply where insurer has never entered into contractual relations with the person claiming under the policy. *Stephenson v. Germania Fire Ins. Co.* 456
6. Where assured had received payment under a tornado policy for total destruction of a building, she could not recover under a fire policy covering the same building. *Brady v. State Ins. Co.* 497
7. A provision in a certificate of membership in a fraternal insurance society that, if death result from violation of law the certificate shall be void, is valid. *Bosler v. Modern Woodmen of America* 570
8. Where the holder of a certificate of insurance was killed by one upon whom he was committing a violent and unprovoked assault, *held* that his beneficiary could not recover. *Bosler v. Modern Woodmen of America* 570
9. The supreme authority of a fraternal society may reconsider the election of an officer and take another ballot at the same meeting, if the first election is the result of fraud or mistake. *State v. Kelly* 619

Insurance—Continued.

10. Where the question of fraud or mistake in the election of an officer of a beneficial society is raised in good faith and determined by the voters, courts will not interfere. *State v. Kelly* 619
11. Where the records of proceedings of a fraternal order are not impeached nor directly attacked, they are conclusive. *State v. Kelly* 619
12. One who is formally presented as a candidate for office in a fraternal order upon final ballot and is voted for without protest cannot object that such ballot was without authority and maintain that she was elected upon a prior ballot. *State v. Kelly* 619
13. State officials have authority to protect members of fraternal beneficiary associations from unauthorized usurpation of authority by officers. *State v. Supreme Forest, Woodmen Circle* 632
14. The supreme court has original jurisdiction of a suit by the state to determine the jurisdiction of contending officers of a fraternal beneficial association. *State v. Supreme Forest, Woodmen Circle* 632
15. Laws enacted by the governing body of a fraternal beneficiary association in harmony with its constitution and state statutes are binding. *State v. Supreme Forest, Woodmen Circle* 632
16. Where the constitution of a fraternal association creates an executive council subordinate to the supreme body, the council could not authorize a committee to conduct the business of the order generally without the approval of a specified number of the members of the supreme body. *State v. Supreme Forest, Woodmen Circle* 632
17. When language of the constitution and by-laws of a fraternal beneficial association is ambiguous, a practical construction by the parties will control. *State v. Supreme Forest, Woodmen Circle* 632
18. Where a clause in a policy provided that, if one person only over 18 and under 60 years of age should be named as beneficiary, the policy should insure such person, held that the clause applied to the beneficiary after expiration of the age limit of 60 years. *Cook v. National Fidelity & Casualty Co.* . 641
19. Limitation in a policy as to age of beneficiary held waived by a renewal of the policy after expiration of age limit. *Cook v. National Fidelity & Casualty Co.* 641

Insurance—Concluded.

20. Where a mutual assessment company sets out in its certificate of membership a synopsis of its by-laws, insured may rely on such synopsis, and the company is estopped to claim exemption from liability under by-laws which insured was led to overlook or to believe inapplicable. *Bierbach v. Mutual Benefit Health & Accident Ass'n.* 675
21. Merely waiting on customers of a saloon as an accommodation held not to constitute insured a "saloon bartender" within a prohibitive provision of his contract with insurer. *Modern Woodmen of America v. Berry* 820
22. Forfeiture of a policy is waived where the insurer with knowledge of the facts subsequently collects premiums. *Modern Woodmen of America v. Berry* 820

Interest.

- A county is chargeable with interest on money collected for care of insane persons and wrongfully withheld. *State v. Stanton County* 747

Intoxicating Liquors. See APPEAL AND ERROR, 2. TRIAL, 1-3.

1. A saloon-keeper is responsible for acts of his employees in sale of liquors to minors, unless made in defendant's absence and in violation of his orders. *Steinkuhler v. State* .. 95
2. Whether instructions by a saloon-keeper to his employees not to sell liquors to minors are in good faith is a question for the jury. *Steinkuhler v. State* 95
3. Evidence held to sustain conviction of sale of liquors to minors. *Steinkuhler v. State* 95
4. In an action on a liquor license bond by a widow and minor children for causing the death of the husband and father on a railroad track, negligence of the railroad company or contributory negligence of the decedent is immaterial. *Hauth v. Sambo* 160
5. Where, in an action against a saloon-keeper and his sureties, the verdict is in excess of the penalty in the bond, the court may render judgment against the principal for the full amount of the verdict and against the surety for the sum stipulated in the bond. *Hauth v. Sambo* 160
6. Licensed liquor dealers and their sureties may be joined in one action for damages resulting from the sales. *Hauth v. Sambo* 160
7. The obligation in a liquor license bond must be interpreted in the light of the law regulating the traffic, and is not primarily to indemnify a private party, but is a public bond to

Intoxicating Liquors—Concluded.

the state as a condition precedent to engaging in the traffic.

Hauth v. Sambo 160

8. A statutory bond given for observance of a law authorizing a business only under specified conditions is not contractual, requiring strict construction. *Hauth v. Sambo* 160

Judgment. See VENDOR AND PURCHASER, 3.

1. A defense successfully made by one of the signers and indorsers of a note, if not made on purely personal grounds, will bar a future action by the same plaintiff against another joint defendant. *Galt v. Hildreth* 15
2. Judgment in an action for conversion held a bar to a subsequent action between the same plaintiffs and one of the former defendants. *Skimmer v. Hoffman* 330
3. Judgment in excess of amount prayed for held improper *Galt v. Hildreth* 422
4. A judgment is not a bar to a subsequent action unless the subject-matter is the same and might have been litigated in the former action, or where the court refused to determine the matter for want of jurisdiction. *Ryan v. Bullion* 705
5. A cause of action fully determined on the merits cannot thereafter be litigated by new proceedings. *Allaire, Woodward & Co. v. Perfection Remedy Co.* 726

Jury.

1. The trial court in determining the qualification of a juror is not confined to his answers, but may consider his demeanor. *Phillips v. Union P. R. Co.* 157
2. The ruling on a challenge of a juror for cause will not be disturbed unless an abuse of discretion is shown. *Phillips v. Union P. R. Co.* 157
3. Where counsel for plaintiff and defendant each struck three jurors from eighteen called, pursuant to local practice, held that defendant's right to exercise other challenges was waived. *Koran v. Cudahy Packing Co.* 693

Landlord and Tenant.

1. Where the landlord's agent promised to keep premises in repair, the tenant had a right to expect that she might walk safely from one part to another in her apartment. *Rankin v. Kountze Real Estate Co.* 69
2. Janitor of a building held to be the servant of the proprietor in making repairs, rendering the proprietor liable for injuries to tenant due to his negligence. *Rankin v. Kountze Real Estate Co.* 69

Landlord and Tenant—Concluded.

3. Proprietor *held* liable for injuries to tenant due to negligence of servant in repairing a threshold. *Rankin v. Kountze Real Estate Co.* 69
4. Where a landlord's servant nailed a thin, elastic board over a threshold and a tenant was injured by a protruding nail, landlord *held* liable. *Rankin v. Kountze Real Estate Co.* ... 69
5. A five-year lease giving lessee an option to renew *held* to entitle lessee to but one renewal. *Powell v. Cone* 562
6. Though a contract granting the right to remove sand and gravel from leased premises uses the term "lease and demise," subsequent provisions may show that it was a lease for that purpose only. *Powell v. Cone* 562
7. In a suit for possession of leased land and for an accounting, *held* that lessee had no rights in the land. *Evans v. Gilmore* 657
8. In an action against a landlord for death of a tenant from asphyxiation, evidence *held* not to show that defective plumbing was the proximate cause of death. *Spratlen v. Ish*.... 844

Larceny.

1. A person convicted of larceny from the person may not be placed under probation by the district court. *Casper v. State* 367
2. Evidence *held* to support conviction of larceny from the person. *Casper v. State* 367
3. Instruction *held* to sufficiently state the essential elements of larceny from the person. *Casper v. State* 367

Libel. See INJUNCTION, 1.**Liens.**

1. The burden of proof is on one who seeks to establish an equitable lien on real estate to produce facts authorizing the interposition of a court of equity. *Enterprise Planing Mill Co. v. Methodist Episcopal Church* 29
2. Evidence *held* insufficient to establish an equitable lien. *Enterprise Planing Mill Co. v. Methodist Episcopal Church* 29

Limitation of Actions.

1. Limitations begin to run in favor of a trustee *ex maleficio* from time of discovery of the wrong, but not in favor of the trustee of a resulting trust until he repudiates his trust. *Johnson v. Petersen* 255
2. Where an attorney undertakes litigation which may arise out of settlement of an estate and to wait for compensation until proceeds of the litigation are realized, the statute of limitations does not begin to run until the litigation is ended. *Ryan v. Bullion* 706

Limitation of Actions—Concluded.

3. Money levied and collected by county authorities under secs. 10094, 10095, Ann. St. 1911, for care of insane persons and transferred to the county general fund is revenue of the state within the exception in sec. 7581, Rev. St. 1913, and the limitation therein does not apply to an action by the state to recover same. *State v. Stanton County* 747

Mandamus.

1. Under sec. 3, ch. 212, Laws 1915, requiring the consolidated city of Omaha to perform all valid subsisting contracts of the city of South Omaha, mandamus will lie to compel such performance. *State v. Dahlman* 416
2. On application for mandamus to enforce an order of the state railway commission, jurisdiction having been acquired and no appeal taken, it will be presumed that the findings of the commission were sustained by evidence. *State v. Missouri P. R. Co.* 700

Master and Servant. See APPEAL AND ERROR, 19, 20. PLEADING, 1.

1. Where employment of a child under 14 is the proximate cause of injury to such child, the employer is liable. *Rookstool v. Cudahy Packing Co.* 118
2. Petition for compensation under the workmen's compensation act should set out the extent and character of the injury, and the judgment should conform thereto, determining whether the disability is permanent, and the time for which periodical payments must be made. *Hanley v. Union Stock Yards Co.* 232
3. If a workman is disqualified to continue his regular employment, the fact that he procures temporary employment is not conclusive that disability has ceased. *Hanley v. Union Stock Yards Co.* 232
4. An order under the workmen's compensation act limiting time of payments to six months is final; but, if the time fixed exceeds six months, after that time either party may apply for a change of the order. *Hanley v. Union Stock Yards Co.* 232
5. Application to modify order for compensation to workman made before expiration of six months held properly dismissed. *Hanley v. Union Stock Yards Co.* 232
6. If the time limited for payments to a workman is not more than six months, a bill of exceptions must be settled with reference to the term at which the order is made. *Hanley v. Union Stock Yards Co.* 232

Master and Servant—Continued.

7. In an action under the employers' liability act, the court may consider how far the injury will probably disable the employee from engaging in his former occupation and award damages in the sum of 50 per cent. of the difference between wages received at time of injury and his earning power thereafter, for the term fixed by statute. *Stoica v. Swift & Co.* 434
8. In an action for personal injuries, instructions considered, and held without error. *Wunrath v. Peoples Furniture & Carpet Co.* 539
9. Evidence, in an action by a servant for injuries from falling into an elevator shaft, held to sustain verdict for plaintiff. *Wunrath v. Peoples Furniture & Carpet Co.* 539
10. Where a master employs a servant in a room in which the air is impregnated with poisonous fumes, he is not relieved from liability by merely furnishing the servant with an appliance to be worn over the mouth and nose to prevent danger, without instruction as to the danger of failure to constantly wear the same. *Wiseman v. Carter White Lead Co.* 584
11. In an action for injuries from poisonous fumes, evidence held to sustain verdict for plaintiff. *Wiseman v. Carter White Lead Co.* 584
12. Variance between petition and proof as to place of accident held immaterial. *Green v. Cudahy Packing Co.* 680
13. It is the duty of a master to use reasonable care to provide a safe way to place of employment. *Green v. Cudahy Packing Co.* 680
14. Where a master has furnished a number of ways, and has kept them guarded and free from pitfalls, the servant may assume that he will continue to keep them safe. *Green v. Cudahy Packing Co.* 680
15. Where a master permits a way to become unsafe, and a servant suffers injury without negligence, the master is liable. *Green v. Cudahy Packing Co.* 680
16. Defendant held liable for injuries to servant occasioned by a defective box furnished by foreman, with direction to servant to hurry. *Koran v. Cudahy Packing Co.*..... 693
17. A workman may assume that his employer has used due diligence to provide suitable appliances, and ordinarily does not assume the risk of the employer's negligence in performing such duties. *Henderson v. Union P. R. Co.* 734
18. Where a defect in an appliance is known to the employee or is obvious, and he continues to use it without objection, he assumes the risk. *Henderson v. Union P. R. Co.* 734

Master and Servant—Concluded.

19. In an action for death of a brakeman knocked from a freight car by a platform, *held*, that the question whether a reasonably safe place was furnished was for the jury, the car being of extra width. *Henderson v. Union P. R. Co.* 734
20. Whether a brakeman killed when knocked from a freight car by a platform had such knowledge of the situation that he assumed the risk of injury, *held* a question for the jury. *Henderson v. Union P. R. Co.* 734

Mortgages.

1. Where the decree of foreclosure contains no direction as to the appraisal and sale, and the mortgaged property is contiguous, its appraisal and sale as a single tract will not be disturbed, in the absence of showing of prejudice. *Clark v. Birge* 769
2. A finding that the appraisal of mortgaged property was not too low, based on conflicting evidence, will not be disturbed, in absence of fraud. *Clark v. Birge* 769

Municipal Corporations. See CONSTITUTIONAL LAW, 6. PARTIES, 3.

1. In making estimate of cost of street pavement, a city engineer need not separately estimate the cost of each item. *Wurdeman v. City of Columbus* 134
2. A contract for street pavement is not in violation of the statute relating to competitive bidding merely because it requires the use of a patented top coating. *Wurdeman v. City of Columbus* 134
3. The duty of city officers in awarding a contract for street paving is not merely ministerial, but partakes of a judicial character, requiring exercise of discretion. *Wurdeman v. City of Columbus* 134
4. Unless expressly authorized by the legislature, a municipal corporation cannot contract to deprive the state of the right to regulate rates of a public service corporation. *Marquis v. Polk County Telephone Co.* 140
5. Contracts for paving made by the city of South Omaha before consolidation with the city of Omaha *held* obligatory on the consolidated city, though the statutory time in which to select material had not expired. *State v. Dahlman* 416
6. Where a city charter provided that property owners might designate material for paving by petition within 20 days from advertisement of bids, council could contract for the improvement on filing of petition, though within the 20 days. *State v. Dahlman* 416

Municipal Corporations—Concluded.

7. In an action for death by drowning in a pond in a city park, petition *held* not to state a cause of action. *Robbins v. City of Omaha* 439
8. A new assessment may be made where the first assessment has been adjudged void because the ordinance creating the improvement district failed to properly define its limits. *Wiese v. City of South Omaha* 492
9. Subds. IV, XVIII, sec. 128, of the South Omaha charter in 1905, *held* not unconstitutional as authorizing assessment of lands for local improvements in excess of the benefits *Wiese v. City of South Omaha* 492
10. Though a city of the metropolitan class cannot prohibit the general and ordinary use of streets, it may regulate traffic. *State v. Omaha & C. B. Street R. Co.* 716
11. City authorities may allow use of streets for moving of buildings. *State v. Omaha & C. B. Street R. Co.* 716
12. Under a general ordinance requiring temporary removal of wires to allow passage of buildings, a provision of a franchise to a street car company providing that it shall so construct its track as to obstruct the streets as little as possible may be construed to require the company to remove its wires to allow passage of buildings. *State v. Omaha & C. B. Street R. Co.* 716
13. Under sec. 4916, Rev. St. 1913, as amended by ch. 86, Laws 1915, an ordinance specifying a street or part of street to be paved *held* to sufficiently describe the proposed paving district. *Ohittenden v. Kibler* 756

Negligence. See RAILROADS. STREET RAILWAYS.

1. The rule of the "last clear chance" is that, when a person is in danger, whether negligent or not, one who knows, or ought to know, of the danger must use every precaution to avoid injuring him. *Johnston v. Delano* 192
2. There is no presumption of ordinary care induced by the instinct of self-preservation when there is evidence of negligence. *Johnston v. Delano* 192
3. There is no presumption of ordinary care induced by instinct of self-preservation when there is controverted evidence of plaintiff's negligence. *Hutton v. Missouri P. R. Co.* 382
4. The fact that a statute or ordinance does not in terms impose a civil liability for its violation does not affect such evidence of its violation as may go to show negligence. *Hoopes v. Creighton* 510

Negligence—Concluded.

5. The violation of any statutory or valid municipal regulation, established for the protection of the public, is ground for a private action for negligence, if the other elements of actionable negligence concur. *Hoopes v. Creighton* 510
6. The proximate cause of an injury is that cause which in natural and continuous sequence, unaccompanied by any efficient intervening cause, produces the injury, and without which the result would not have occurred. *Spratlen v. Ish* 844

New Trial. See CRIMINAL LAW, 7.

1. If the supreme court affirms a judgment, the time for application for a new trial begins to run from date of judgment in the district court, but if the supreme court directs a different judgment, the time runs from the entry of the judgment directed. *Smith v. Goodman* 284
2. Requisite allegations of petition for a new trial for newly discovered evidence under sec. 8207, Rev. St. 1913, stated. *Smith v. Goodman* 284
3. Newly discovered evidence must be material and not merely cumulative, and must be of such a substantial nature as to render a different judgment probable. *Smith v. Goodman* .. 284
4. Public records will rarely be admitted as newly discovered evidence. *Smith v. Goodman* 284
5. Records and written documents relied on as newly discovered evidence should be described, and so much of them set out that the court can determine whether they call for a new trial. *Smith v. Goodman* 284
6. That a witness who testified at the trial will vary or contradict his former testimony is not ground for new trial. *Smith v. Goodman* 284
7. Petition for new trial held insufficient to show abuse of discretion in sustaining a demurrer thereto. *Smith v. Goodman* 284
8. Remarks of counsel, not objected to, held not ground for new trial. *Kriss v. Union P. R. Co.* 801

Parties. See BILLS AND NOTES, 2. DRAINS, 3. INTOXICATING LIQUORS, 6.

1. To intervene, party must have such direct and immediate interest that he will either gain or lose by the direct legal operation of the judgment, and this interest must arise from a claim to the subject-matter of the action or a lien on the property. *Latham v. Chicago, B. & Q. R. Co.* 173

Parties—Concluded.

2. Sec. 7604, Rev. St. 1913, providing for bringing in of additional parties, applies to cases where there are other persons whose rights must be ascertained and settled before the rights of the parties to the suit can be determined. *Kaplan v. City of Omaha* 567
3. In an action against a city for personal injuries, *held* that a contractor who was liable to the city as an indemnitor need not be made an additional defendant. *Kaplan v. City of Omaha* 567

Partition.

1. Equity may decree partition sale of personalty owned in unequal shares by two parties, each of whom has a right of possession. *Riley v. Whittier* 107
2. Evidence *held* to sustain decree for an accounting and partition of personalty. *Riley v. Whittier* 107

Pleading. See EXECUTORS AND ADMINISTRATORS, 4. NEW TRIAL, 2. TRIAL, 9.

1. Assumption of risk not usually and ordinarily incident to service must be specially pleaded. *Phillips v. Union P. R. Co.* 157
2. Reply, in suit by a vendor for price of land, *held* to admit that the land was the homestead of the deceased owner, and that an administrator's sale to pay debts was invalid and not sufficient to convey interests of heirs. *Fassler v. Streit* 722
3. Where a petition alleged that a minor, when injured, was 14 years of age, another allegation that he was under 15 must be construed against the pleader as also alleging that he was 14 at time of injury. *Rookstool v. Cudahy Packing Co.* 851

Principal and Agent.

1. It is an agent's duty to inform his principal of all facts coming to his knowledge in the course of his employment, and in a subsequent action between his principal and a third person it will be conclusively presumed that he performed such duty. *Modern Woodmen of America v. Berry* 820
2. Notice to an agent in the course of his employment is notice to his principal. *Modern Woodmen of America v. Berry* ... 820
3. Principal *held* not liable for unauthorized acts of agents in the purchase of cream. *Marshall & Co. v. Kirschbraun & Sons* 876
4. Where an agent mingled cream purchased at an unauthorized price with other cream belonging to his principal and shipped it to his principal, who made a salable commodity and prevented a total loss, *held* there was no ratification of the agent's acts. *Marshall & Co. v. Kirschbraun & Sons* 876

Principal and Surety. See APPEAL AND ERROR, 2. INDEMNITY. INTOXICATING LIQUORS, 5. SUBROGATION.

Process.

Application for order for service by publication *held* sufficient.
Younte v. Specht 133

Quo Warranto.

1. *Quo warranto* under sec. 8328, Rev. St. 1913, is intended to prevent the exercise of powers not conferred by law, and is not ordinarily available to regulate the manner of exercising those powers. *State v. Drainage District* 625
2. *Quo warranto* *held* to lie to test right of directors of drainage district to proceed with work, where the electors rejected the proposition. *State v. Drainage District* 625

Railroads. See MASTER AND SERVANT, 19, 20. STATUTES, 7, 8.

1. Where conditions proved are such that one who looked and listened must have seen an approaching train, the conclusion necessarily follows that in attempting to cross the tracks he was guilty of negligence. *Johnston v. Delano* 192
2. A person going on a railroad crossing without looking and listening for a train, without reasonable excuse, is guilty of negligence, barring recovery for any injury. *Johnston v. Delano* 192
3. Where two persons of equal authority drive on a railroad track in front of an approaching train in full view, it is immaterial which person drove, since, if either looked, he must have seen the train. *Johnston v. Delano* 192
4. Travelers at a private crossing are guilty of negligence if they assume to know when trains will be run, and so fail to look and listen. *Johnston v. Delano* 192
5. In the absence of proof of opportunity to avoid injuring a person after his danger was, or ought to have been, discovered, the last clear chance doctrine does not apply. *Johnston v. Delano* 192
6. Erection and maintenance of convenient structures at a railroad station is not negligence as to one entirely familiar with the situation. *Rickert v. Union P. R. Co.* 304
7. Testimony of witnesses that they did not hear signals *held* not to sustain finding that signals were not given, where other witnesses testified positively that signals were given. *Rickert v. Union P. R. Co.*, 304
8. Plaintiff *held* guilty of contributory negligence in attempting to cross a railroad track in front of an approaching train. *Rickert v. Union P. R. Co.* 304

Railroads—Concluded.

9. It is the duty of a traveler approaching a railroad crossing to look and listen for trains, and if he fails, without reasonable excuse, to do so, no recovery can be had for his death. *Rickert v. Union P. R. Co.* 304
10. Whether engineer signaled before crossing highway as required by sec. 6023, Rev. St. 1913, is a question for the jury where the evidence is conflicting. *Campbell v. Union P. R. Co.* 375
11. Railroad company *held* not liable for injuries to a wilful trespasser. *Hutton v. Missouri P. R. Co.* 382

Replevin.

1. Where a contract of sale of merchandise provides that the seller shall retain possession until he has received a stated sum, and that the purchaser shall manage the business, their possession is joint, and neither can maintain replevin against the other. *Whittier v. Riley* 104
2. Under sec. 7833, Rev. St. 1913, providing that, where the finding is for defendant in replevin, the judgment shall be for a return of the property, or its value if a return cannot be had, the value should be the equivalent of the property as at the time of trial. *Wallace v. Cox* 601
3. Where judgment for defendant in replevin is affirmed on appeal, and the property is returned, in an action on the appeal bond plaintiff cannot recover damages occurring prior to the original judgment. *Wallace v. Cox* 601

Sales.

Whether the description in a contract, together with inquiries which the contract suggests, will enable third persons to identify the property is ordinarily a question for the jury; but, where only one conclusion can reasonably be drawn, it is a question for the court. *Crancer Co. v. Cooper* 335

Schools and School Districts. See STATUTES, 2.

1. Ch. 252, Laws 1913, providing for establishment of county high schools, was not repealed by ch. 120, Laws 1915. *Peterson v. Anderson* 149
2. Where two *ex officio* members of a school board appointed a third member, and the three filled the other two vacancies, *held*, that the members constituted a *de facto* board and their action was valid; and that an estimate made by the full board furnished sufficient authority for the county board to levy a tax for a county high school. *Peterson v. Anderson*... 149

Schools and School Districts—Concluded.

3. That an estimate made by regents of a county high school for a tax was communicated in an informal manner to the county board is a mere irregularity, and not a jurisdictional defect. *Peterson v. Anderson* 149
4. Subd. 3, sec. 6703, Rev. St. 1913, held to confer authority on the county superintendent of schools to organize unorganized territory into new districts or to attach it to adjoining districts without petition or notice. *State v. Frye* 364

Specific Performance. See WILLS, 3.

Specific performance of a land contract may be denied the vendor, where he misled the vendee as to the quantity to be conveyed, even though he acted innocently. *Bentley v. Space* ... 486

State Railway Commission.

Secs. 6128, 6139, Rev. St. 1913, provide that, in appeals from the railway commission as to rates, their decision is *prima facie* evidence that the rates fixed are reasonable, and they shall remain until revised by the commission, or adjudged to be unreasonable by the court. *Marquis v. Polk County Telephone Co.* 140

States.

Secs. 10094, 10095, Ann. St. 1911, authorizing county boards to levy and collect money for care of insane persons, do not constitute appropriations of public money of the state within the constitutional provisions. *State v. Stanton County* 747

Statute of Frauds. See BROKERS, 1-3.**Statutes. See SCHOOLS AND SCHOOL DISTRICTS, 1, 4.**

1. Changes of existing statutes as an incidental result of adopting a new law covering the whole subject are not forbidden by sec. 11, art. III, Const. *Uttley v. Sievers*..... 59
2. The provision in sec. 6831, Rev. St. 1913, for free tuition for all pupils of the county in the county high school is invalid as to pupils residing in districts not taxed to support the school; but, not being the inducement to the passage of the act, does not render the act void. *Peterson v. Anderson* 149
3. An act complete in itself is not unconstitutional because it incidentally modifies, changes or destroys the effect of existing statutes. *State v. Moorhead* 298
4. Ch. 224, Laws 1915, providing that the county attorney shall be *ex officio* coroner, incorporates in the new law the existing laws defining the duties of coronor. *State v. Moorhead* 298
5. Ch. 224, Laws 1915, requiring the county attorney to perform the duties of coroner, is complete in itself, and does not vio-

Statutes—Concluded.

- late sec. 11, art. III, Const., relating to amendment of laws.
State v. Moorhead 298
6. A statute may be upheld on one ground and be declared unconstitutional upon a subsequent attack by another litigant for other grounds. *Davison v. Chicago & N. W. R. Co.* 462
 7. A statute regulating speed of carriage of live stock is a proper exercise of police power, if it is reasonable and practical in its operation, and does not impose an undue burden on the carrier. *Davison v. Chicago & N. W. R. Co.* 462
 8. Secs. 6018, 6019, Rev. St. 1913, relating to speed of carriage of live stock, *held* unconstitutional, as being unreasonable and in permitting no defense, and violating constitutional rights. *Davison v. Chicago & N. W. R. Co.* 462
 9. A simultaneous repeal and re-enactment of a statute is an affirmation of the original, and not a repeal. *Wiese v. City of South Omaha* 492
 10. The title to ch. 145, Laws 1911, entitled "An Act to amend sec. 15, art. V, ch. 89, Comp. St. 1909, relating to drainage districts," *held* broad enough to admit legislation germane to the subject-matter of the act amended, and not inconsistent therewith. *State v. Drainage District* 625
 11. Sec. 44, ch. 145, Laws 1911 (Rev. St. 1913, sec. 1914), *held* germane to the original drainage act (Laws 1907, ch. 153), and not inconsistent with sec. 20 thereof, and valid. *State v. Drainage District* 625
 12. Failure of presiding officer of senate to sign a bill *held* not to affect its validity. *State v. Missouri P. R. Co.* 700
 13. A statute susceptible of a reasonable construction avoiding a conflict with the Constitution should be so construed. *State v. Missouri P. R. Co.* 700
 14. Ch. 86, Laws 1915, *held* violative of sec. 4, art. III, Const., relative to time of introduction of legislative bills. *Chittenden v. Kibler* 756
 15. A statute conferring authority upon an officer or board under the police power should be strictly construed, and all powers not specifically granted or necessarily implied are reserved. *State v. Morehead* 864

Stipulations.

- Where parties agree upon two stipulations, one tending to increase the amount of plaintiff's claim and the other to diminish it, neither party, after submission of the case on such stipulations, can withdraw the one against his interest and insist on the other. *Kriss v. Union P. R. Co.* 801

Street Railways.

- Where a motorman in an emergency, acting on his best judgment, attempts to stop the car instead of lowering the fender, he is not negligent as a matter of law. *Shapiro v. Omaha & C. B. Street R. Co.* 452

Subrogation.

- Where a bank fails while having on deposit county funds in excess of the amount of its depository bond, and the surety on the bond pays the full amount of its liability and the treasurer's surety pays the over-deposit, the sureties may share ratably the dividends paid on the county's claim. *Cole v. Myers* 480

Taxation. See SCHOOLS AND SCHOOL DISTRICTS, 2, 3.

1. Under ch. 73, Laws 1903, a county board of equalization may without complaint by a taxpayer add omitted property to the assessment list or increase valuation, but in such case a complaint should be framed by the assessor or the board, and the taxpayer must be notified, if found in the county. *Farmers Co-operative Creamery & Supply Co. v. McDonald* 33
2. Under secs. 6437, 6442, Rev. St. 1913, the 20 days' session of a county board of equalization need not run 20 consecutive days. *Farmers Co-operative Creamery & Supply Co. v. McDonald* 33
3. Where an assessment is increased by the county board of equalization without jurisdiction, collection of taxes based on the increased valuation may be enjoined. *Farmers Co-operative Creamery & Supply Co. v. McDonald* 33
4. Unless a tax is levied for an illegal or unauthorized purpose, its collection cannot be stayed by injunction. *Peterson v. Anderson* 149
5. The constitutional inhibition against levy of taxes by county authorities in excess of \$1.50 per \$100 valuation does not apply to taxes levied for county high school purposes. *Peterson v. Anderson* 149
6. A tax levy made by a majority of the county board is not void for want of jurisdiction, though the record recites that it was made by the board of equalization. *Peterson v. Anderson* ... 149
7. That one public service corporation furnishes heat, light and power by electric current conveyed by wires and another by gas conveyed by mains does not justify levy of an occupation tax on one and not on the other. *City of Lincoln v. Lincoln Gas & Electric Light Co.* 182
8. Taxes cannot be recovered on the ground of double assessment, where the tax receipt neither shows payment under

Taxation—Concluded.

- protest nor any ground of protest. *Black Bros. v. Logan County* 478
9. The state's claim against a county for money levied and collected for care of insane persons need not be presented to county board under sec. 5638, Rev. St. 1913, before suit to recover same. *State v. Stanton County* 747

Telegraphs and Telephones.

1. A contract in a franchise ordinance fixing maximum rates to be charged for use of telephones is subject to the right of regulation. *Marquis v. Polk County Telephone Co.* 140
2. Since adoption of the constitutional amendment creating the state railway commission and passage of the law specifying their duties, the commission has power to regulate telephone rates in cities of the second class. *Marquis v. Polk County Telephone Co.* 140
3. Evidence held to show that the rate of \$2.50 a month for a business telephone in the city of Stromsburg is not unreasonable. *Marquis v. Polk County Telephone Co.* 140

Torts.

- Settlement with one joint wrongdoer is no defense to an action against another, unless it was agreed that such settlement was in full of all damages. *Hauth v. Sambo* 160

Trial. See ATTORNEY AND CLIENT. BASTARDY. BROKERS, 4. CARRIERS, 2. CRIMINAL LAW. FALSE IMPRISONMENT, 2, 3. SALES. WILLS, 10, 11.

1. Instruction defining "Intoxication" held sufficient, where evidence of intoxication was so strong that the jury could not have been misled. *Hauth v. Sambo* 160
2. In an action on a liquor dealer's bond, refusal of instruction that, if the accident which caused death would have happened whether decedent was intoxicated or sober, and liquor furnished did not contribute to the accident, verdict should be for the defendants, held not error; the first part calling for speculation, and the latter covered by instructions given. *Hauth v. Sambo* 160
3. Refusal of instruction eliminating recovery for loss of society and companionship of decedent, and for injury to feelings and sentiments, held not error. *Hauth v. Sambo* 160
4. Copying the pleadings in an instruction in an action for negligence held not error, where the issues were correctly submitted by other instructions. *Shapiro v. Omaha & C. B. Street R. Co.* 452

Trial—Concluded.

5. Unless the evidence tends to show that a witness has wilfully sworn falsely, an instruction that, if he has intentionally sworn falsely to any material matter, the jury may disregard his entire testimony, *held* not justifiable. *Wunrath v. Peoples Furniture & Carpet Co.* 539
6. The refusal of a requested instruction which assumes the existence of a material fact upon which the evidence is conflicting is not ground for reversal. *Van Dorn v. Kimball* ... 590
7. Complaint cannot be made that more detailed instruction was not given, where none was requested. *Van Dorn v. Kimball* 590
8. Instructions as to reasonable cause *held* not to be so inconsistent as to require a reversal. *Van Dorn v. Kimball* 590
9. Where the pleader sets out the alleged meaning of a written contract in his pleading, and evidence is introduced on such issue, a verdict under proper instructions, not excepted to, will not be disturbed. *Felthausen v. Greeble* 652
10. When the condition of the record and the form of the question itself show its relevancy, no offer of proof is necessary. *In re Estate of Johnson* 791
11. When a general instruction on an issue is given, request for more specific instruction should fairly present the matter as it affects all the litigants. *Kriss v. Union P. R. Co.* 801
12. Where, at the close of trial of a law action, each party moves for a directed verdict and the motion of one party is sustained, the court's finding takes the place of a verdict. *Modern Woodmen of America v. Berry* 820

Trusts. See LIMITATION OF ACTIONS, 1.

1. In a suit to declare a trust in lands, declarations of the ancestor, through whom defendants acquired title without valuable consideration, are admissible in evidence. *Johnson v. Petersen* 255
2. Where a testator bequeathed property, the legatee promising to hold it for the benefit of another, he will be held as trustee. *Crinkley v. Rogers* 647
3. Where a testator bequeathed property for the benefit of another, equity will compel the legatee as trustee *ex maleficio* to deliver it to the beneficiary. *Crinkley v. Rogers* 647

Vendor and Purchaser. See CONTRACTS, 3. PLEADING, 2.

1. A prospective purchaser is not put on inquiry relative to the ownership of customary outbuildings on a farm, though he knows that the farm is occupied by a tenant. *Roden v. Williams* 46

Vendor and Purchaser—Concluded.

2. Where the owner, without reserving outbuildings, contracts in writing to sell a farm, and receives the full consideration, he is liable to the purchaser for the value of such outbuildings, if owned and removed by a tenant. *Roden v. Williams* 46
3. One who has conveyed land with covenants of title is entitled to notice and opportunity to defend a suit against his grantee contesting title; but, if he has notice and fails to defend, he is bound by the decree. *Fassler v. Streit* 722
4. Where a decree is adverse to a grantee under a deed with covenants of warranty, the grantee may pay the adverse claim and set off same against the unpaid price of the land. *Fassler v. Streit* 722

Waters.

1. To the extent that a landowner, under a prior appropriation, uses water of a river for irrigation when actually needed, diversions by upper appropriators are not adverse. *Maranville Ditch Co. v. Kilpatrick Bros. Co.* 371
2. A village having for years maintained a lateral ditch for irrigation purposes in a street, a landowner who irrigated his land for a long time from such lateral cannot be deprived of his rights by the village in the regulation of its streets, unless it furnish him another lateral. *Thornton v. Kingrey* 525
3. A village may require one using water from a lateral for irrigation to receive water from another lateral, where it provides suitable connection. *Thornton v. Kingrey* 525

Wills.

1. While a limitation repugnant to a devise of the fee is void, a subsequent clause disposing of the property on the death of the devisee may be considered an indication of the testator's intent to devise a life estate only, where such previous clause does not clearly devise the fee. *Schminke v. Sinclair* 101
2. A devise to testator's widow so long as she shall remain unmarried, the property in the event of her marriage or death to be divided among testator's children, *held* to vest a life estate only. *Schminke v. Sinclair* 101
3. An oral contract to devise land and bequeath money in consideration of services *held* enforceable, where the beneficiary has performed the services, the value of which cannot be determined. *Rine v. Rine* 225
4. A statute fixing the time for election to take under an antenuptial contract or under the statute pertains to the remedy, and compliance with the statute in force at husband's death or at filing of election is sufficient. *In re Estate of Enyart* 337

Wills—Concluded.

5. An agreement upon sufficient consideration to devise or bequeath property is valid. *Crinkley v. Rogers* 647
6. In case of a contract to devise and bequeath property, equity will impress a trust on the property, which will follow it into the hands of personal representatives of the promisor or grantees without consideration. *Crinkley v. Rogers*..... 647
7. Every one is entitled to control his property while living, and to direct its use by will after his death. *In re Estate of Johnson* 791
8. The trial of a proposed will is to determine whether it is in fact the will of the decedent rather than the will of interested parties who have procured its execution by undue influence. *In re Estate of Johnson* 791
9. Statements of decedent, not made at time of executing a will, are generally incompetent as proof of undue influence, but are admissible if they tend to prove the condition of his mind as to unbiased disposition of his property. *In re Estate of Johnson* 791
10. An instruction that "influence that amounts to undue influence must be such as to compel, overpower, and coerce one to do something which he does not want to do," held erroneous in view of the circumstances of the case. *In re Estate of Johnson* ... 791
11. Where undue influence is established by a preponderance of the evidence, the proposed will must be rejected, and an instruction that, unless the jury are convinced thereby, they cannot reject the will is inaccurate, and may be prejudicial. *In re Estate of Johnson* 791
12. If a proposed will recites a reason for disinheritance a son who is contesting it on the ground of undue influence by beneficiaries, it is competent, in connection with other evidence of undue influence, to prove that no such reason existed. *In re Estate of Johnson* 791
13. Upon appeal from a judgment admitting a will to probate, the district court tries all questions *de novo*, and must determine whether the proposed will has been altered and the consequences of alteration, if any. *In re Estate of Johnson* ... 791

Witnesses. See EVIDENCE.

1. Where a witness testifies at the trial at variance with his deposition, the party calling him may, after interrogating him as to the deposed statements, use the deposition to show such inconsistent statements. *Hauth v. Sambo* 160

Witnesses—Concluded.

2. It is error to take unsworn statements of an interested party as to the qualifications of a witness seven years old and exclude her testimony without examination by the court. *Roberts v. State* 199
3. In a suit for specific performance of a contract to devise land, counsel for plaintiff and her son *held* not disqualified to testify as to conversations with decedent. *Rine v. Rine*..... 225
4. Where checks and receipts for annual payments under an antenuptial contract have been received in evidence on behalf of representatives of the deceased husband, the widow may testify to the same transactions. *In re Estate of Enyart*.... 337
5. Testimony of witnesses having a direct legal interest in the subject in controversy, and of the attorney and confidential adviser of the deceased, *held* properly excluded under secs. 7894, 7898, Rev. St. 1913. *Crinkley v. Rogers* 647
6. Where proponent, a beneficiary, alleged by contestants to have used undue influence, contradicts evidence of his undue influence, the court should allow full cross-examination as to his conduct toward the testator. *In re Estate of Johnson* ... 791

E. J. Mc.
8/28/17





